Supreme Court, U.S.

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARK B. RASMUSSON, et. al.,

Petitioners,

v.

LAWRENCE E. FROST, et. al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX A
Court Orders

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COURT ORDERS

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[Filed November 9, 1998]

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 97-50283
No. 97-50533

MARK B. RASMUSSON, et al.,

Plaintiffs-Appellants,

versus

LAWRENCE E. FROST, et al.,

Defendants-Appellees.

Appeals from the United States District Court
For the Western District of Texas
(EP-95-CV-475)

Before EMILIO M. GARZA, BENAVIDES, and DENNIS, Circuit Judges.
PER CURIAM:*[1]

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

The plaintiffs urge various causes of action based on alleged facts arising from a criminal investigation by numerous law enforcement officials. As the district court described the case, "the Plaintiffs, in essence, are complaining of being the targets of a criminal investigation that failed to produce evidence of indictable wrongdoing." In a detailed, comprehensive, and convincing ninety-page Memorandum Opinion and Order entered on May 27, 1997, the district court determined that plaintiffs are entitled to no relief because, among other reasons, they have failed to state a claim, or their claims are barred by limitations, or the defendants are entitled to summary judgment.

We agree with the district court that "[t]he complaint in this action reads more like a script for an Oliver Stone movie than a suit for civil damages." Essentially for the reasons stated by the district court, the judgment is AFFIRMED.

[Paragraph numbers added to text]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS EL PASO DIVISION

Mark B. Rasmusson §
Deborah L. Rasmusson §
Andrew A. Gantkessy, and §
Rasmark Jet Charter, Inc., §
§
Plaintiffs §
§
v. § **EP-95-CA-475**
§
Lawrence E. Frost, § May 22, 1997
George J. Weise, §
Carol B. Hallett, §
John E. Hensley, §
Donald L. Reay, §
Michael T. Lappe, §
Michael J. Wilczewski, §
Fred J. Schroeder, §
Walter J. King, §
Larry Brown, §
Eric Mills, §
Steven Eric Perkins, §
Eli P. Chavez, §
Raphael Aguirre, §
Tom Lenox, §
Fonda R. Hivick, §
Robert L. Martinez, §
Joe Acosta, §
§
In their individual capacities §

County of El Paso, §
City of El Paso, §
El Paso County Sheriff's §
Department, §
El Paso Police Department, §
§
El Paso County Sheriff Leo §
Samaniego, §
Chief of Police Russ Leach, §
§
In their official capacities §
only §
§
George L. Salas, §
James Holland, §
Neil Baker, §
Jerry Keith, §
§
In their individual and §
official capacities §
§
Gail Beach, §
Chris Hines, §
Aero Freight, Inc., §
§
Defendants §

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

1. The complaint in this action reads more like a script for an Oliver Stone movie than a suit for civil damages. Loud cries of "conspiracy and cover-up" reverberate throughout hundreds of pages of allegations. Accused of wrongdoing is a legion of law enforcement officers, from the top brass in our nation's capital to the foot soldiers working the beat day in and day out, all allegedly ensnared in a

conspiracy web so broad that the court is left to wonder how and why so many could and would have conspired so long to harm so few. Nonetheless, the court has been patient with Plaintiffs, giving them every opportunity to show, somewhere in the vastness of their presentation, that some kind of cognizable action does exist. No showing has been forthcoming; thus, for the reasons stated herein, Plaintiffs' claims are dismissed en toto.

2. To fully understand the issues at hand, one must travel back in time to the turn of this decade. The place is El Paso, Texas; the time, circa 1989. A drug enforcement task force came into existence. When and how is not particularly relevant to the case at hand. Its objective was to investigate drug trafficking and money laundering between the United States and Mexico. The focus of this task force quickly became Jesus Flores, a Mexican national residing in El Paso, and his associates. Flores, who owned a remodeling business in El Paso, was suspected of running a large scale drug operation.

3. As the investigation progressed, task force members became aware that Flores was relying on Rasmark Jet Charter, Inc., a charter company owned by Plaintiffs Mark and Debra Rasmusson, for his transportation needs. Rasmark, and both Rasmussons, naturally became targets of the investigation, albeit never its primary targets. As the Plaintiffs tell it, they became the subjects of around the clock harassment by the Customs Service. Their planes were constantly being searched, even when no international flights were made, and their pilots constantly questioned and harassed. In time, the investigation resulted in a federal grand jury issuing indictments against nine Defendants, including Mark Rasmusson. Mr. Rasmusson was charged with one count of aiding and abetting a drug trafficking operation. He plead not guilty and his case went before a jury. Prior to the conclusion of the jury trial, however, the presiding judge directed a verdict of acquittal in Mr. Rasmusson's favor.[1]

FN 1. *United States v. Jesus Flores et al.*, EP-90-CR-258-H.

4. The story picks up again in March 1992. That month, a Financial Task Force (FTF or Task Force) was created within the Customs Service to investigate money laundering activities between the United States and Mexico.[2] The FTF was certified as an Organized Crime/Drug Enforcement Task Force (OCDETF), and was composed of numerous federal, state and local agencies. The primary focus of the Task Force was a large organization believed to be involved in large scale money laundering operations in the El Paso, Texas--Juarez, Mexico area. Here, too, the Task Force became aware that Rasmark was providing transportation services to members of that organization, and began investigating Rasmark and the Rasmussons for possible connections.

5. The investigation of Rasmark and the Rasmussons consisted of undercover surveillance work, interviewing former and current employees, interviewing the Rasmussons, conducting searches pursuant to search warrants, and requesting records from customers employing Rasmark. While circumstantial evidence linking the Rasmussons to the money laundering scheme was obtained, no charges were ever brought, and the Task Force was decertified as an Organized Crime/Drug Enforcement Task Force sometime in 1994.

6. On November 21, 1995, Plaintiffs filed their original complaint in federal district court, alleging a plethora of wrongs against numerous defendants. Because Plaintiffs' live pleading is their Third Amended Complaint, the court will not discuss the kaleidoscope of issues or defendants which have appeared, disappeared, and then reappeared, in Plaintiffs' original and subsequently amended complaints. Instead, the court will concentrate only on the Defendants sued and the

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FN 2. The Rasmussons are under the misimpression that the FTF began its investigative activities of them and of Rasmark in 1990. That is not the case. The Task Force conducting the Flores investigation was not the same Task Force in charge of investigating the Rasmussons. Although both Task Forces were certified as Organized Crime/Drug Enforcement Task Forces, the FTF came into existence in March 1992.

issues presented in Plaintiffs' Third Amended Complaint.

7. On one side are four named Plaintiffs: Mark Rasmusson, Debra Rasmusson, Andrew Gantkessy and Rasmark Jet Charter, Inc., the company owned by the Rasmussons. Although the complaint reads as though each Plaintiff asserts each claim against various Defendants, that is not, in fact, the case. The corporate Plaintiff, Rasmark Jet Charter, Inc., for instance, cannot maintain a claim under either Bivens or § 1983, as can the natural Plaintiffs.[3] It can only seek to recover in tort against the federal government under the Federal Tort Claims Act (FTCA) for interference with contractual relations, as is explained in detail below.

8. The crux of Plaintiff Gantkessy's claim is that he lost his job with Ford Motor Company because of a letter sent to his employer by one of the Defendants, Agent Lappe. Gantkessy maintains that his First Amendment rights to freedom of association were violated and his present and future employment relations were interfered with. In fact, however, Gantkessy has failed to state claim under either the First

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FN 3. A corporation is not a "citizen" entitled to the privileges and immunities secured by federal law for purposes of § 1983. L.S. T, Inc. v. Crow, 49 F.3d 679, 683 n. 6 (11th Cir. 1995) (citing Hague v. Committee for Indus. Org., 307 U.S. 496, 514, 59 S.Ct. 954, 963, 83 L.Ed. 1423, 1436 (1939) ("Natural persons, and they alone, are entitled to the privileges an immunities which § 1 of the Fourteenth Amendment secures for 'citizens of the United States. '"). The cases cited by Plaintiffs to the court deal with the standing of associations to assert claims on behalf of their members, and not the standing of corporations to raise § 1983 claims. See, e.g., Pennell v. City of San Jose, 485 U.S. 1, 7, 108 S.Ct. 849, 855, 99 L.Ed.2d 1 (1988) (setting forth the requirements for associational standing) Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 342, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977) ("This Court has recognized that an association may have standing to assert the claims of its members even where it has suffered no injury from the challenged activity.").

Amendment or any other provision of the constitution or federal law.[4] Like Rasmark's, Gantkessy's potential claims lie only in tort against the federal government under the FTCA. But all of Gantkessy's claims, like Rasmark's claims, are not actionable under the FTCA. As such, the court finds that Rasmark and Gantkessy have failed to state claims on which relief can be granted, to be more fully explained in the course of this Opinion and Order. Because they have not stated a cognizable claim, and because Gantkessy's involvement in the events in question was especially marginal, the majority of this opinion is spent discussing the various claims brought by the Rasmussons. As such, unless otherwise expressly stated, all references to "Plaintiffs" are references to the Rasmussons.

9. The Plaintiffs sue thirty-two defendants. The group includes individuals, government entities, and government departments. Among the individual Defendants are those being sued in their official capacity only, their individual capacity only, and their individual and official capacity. The court discusses the role of each Defendant in detail below

10. From what the court can tell, Plaintiffs have raised a total of eight claims. First, Plaintiffs allege that all Defendants except for Hallett, Weise, Hensley, Samaniego and Leach have conspired to deprive them of their constitutional rights under the First, Fourth, Fifth and Fourteenth Amendments. Second, Plaintiffs complain that federal agents created bogus investigation reports in violation of their Fifth Amendment rights, and then covered up their conspiratorial acts. Third, Plaintiffs allege that their 4th Amendment rights against unreasonable searches and seizures were violated. Fourth, Plaintiffs allege that all

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FN 4. Neither harm to reputation nor the consequent impairment of future employment opportunities are constitutionally cognizable injuries. Siegert v. Gilley, 500 U.S. 226,233, 111 S.Ct. 1789, 1794, 114 L.Ed.2d 277 (1991); Paul v. Davis, 424 U.S. 693, 708-09, 96 S.Ct. 1155, 1164-65, 47 L.Ed.2d 405 (1976); Vander Zee v. Reno, 73 F.3d 1365, 1369 (5th Cir. 1996).

Defendants conspired to tortiously interfere with their current and prospective business contracts and business relationships with State National Bank, Texas Commerce Bank and Ford Motor Company. And, here too, Defendants conspired to cover up this act as well. Fifth, Plaintiffs allege that the City of El Paso, the El Paso Police Department and Chief of Police Russ Leach failed to adequately train and supervise the police officers involved in investigating Plaintiffs. Naturally, the City of El Paso, the Police Department, its Chief, and the named officers all conspired to cover up their acts. Sixth, the Plaintiffs restate their fifth claim, but only against El Paso County, El Paso County Sheriff s Department and Sheriff Leo Sarnaniego. Seventh, Plaintiffs rehash their first claim and allege a great conspiracy on behalf of all of the Defendants. And finally, Plaintiffs allege a cover-up, or an attempted cover-up of all of the wrongful acts.

11. Plaintiffs' complaint rambles for 212 pages. Dickensian prose it is not. Rather, it is 493 mainly disjointed paragraphs, often speaking of time periods and events so far removed from the issues at hand as to be totally unrelated. From what the court can decipher, Plaintiffs are suing the individual federal Defendants under Bivens and 42 U.S.C. § 1985. The local and county entities and individuals are being sued under 42 U.S.C. §§ 1983 and 1985. The state law claims over which the court is being asked to exercise supplemental jurisdiction include civil conspiracy, gross negligence, defamation, tortious interference with business relations, tortious interference with prospective contract, tortious interference with contract relations and tortious interference with employment contract.

12. All individual Defendants have filed Motions to Dismiss, Motions for Summary Judgment, or both, on grounds of qualified immunity, statute of limitations and the failure to state a claim. Oral argument on all outstanding motions was heard by the court in El Paso on April 21, 1997. What became clear at the April 21st hearing is that the Plaintiffs, in essence, are complaining of being the targets of a criminal investigation that failed to produce evidence of indictable wrongdoing. Their complaint is that the investigation took too long and resulted in the loss of business and employment. Because the court considered various affidavits in coming to a decision, all motions to

dismiss will be construed as motions for summary judgment.[5] Having considered all motions, oral argument, and relevant case law, the court is of the opinion that no genuine issues of material fact exist as to any of the claims asserted and that all named Defendants are entitled to summary judgment as a matter of law. The court will first summarize the legal standards governing its decision and will then set forth its reasoning.

II. SUMMARY JUDGMENT ANALYSIS

13. Rule 56(c) provides that "[summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[6] A party seeking summary judgment bears the initial burden of informing the district court of the basis for the motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which the moving party believes demonstrate the absence of a genuine issue of material fact.[7] The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.[8] A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the

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FN 5. *See* FED.R.Civ.P. 12(c).

FN 6. FED.R.CIV.P. 56(c).

FN 7. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986); *Medowbriar Home for Children, Inc. v. G.B. Gunn,* 81 F.3d 521, 533 (5th Cir. 1996).

FN 8. *Willis v. Roche Biomedical Lab., Inc.*, 61 F.3d 313, 315 (5th Cir. 1995).

non-moving party.[9]

14. Once the movant carries this burden, the burden shifts to the nonmovant to show the existence of a genuine issue for trial.[10] This burden is not satisfied with some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence.[11] The nonmovant "must adduce admissible evidence which creates a fact issue concerning the existence of every essential component of that party's case.[12] Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.[13] Factual disputes that are unnecessary or irrelevant will not be counted.[14] In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden.[15]

15. This standard provides that the mere existence of *some* factual dispute will not defeat a motion for summary judgment; Rule 56

FN 9. *Anderson v. Liberty-Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 956 (5th Cir. 1993).

FN 10. *Celotex*, 477 U.S. at 323-26,106 S.Ct. at 2553-54; Matsushita Electric Indus. Co. V. Zenith Radio, 475 U.S. 574, 585-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986).

FN 11. *Willis*, 61 F.3d at 315 (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)).

FN 12 *Krim*, 989 F.2d at 1442.

FN 13 *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510.

FN 14. Id. (citing 10A C. WRIGHT, A. MILLER &M. KANE, FEDERAL PRACTICE & PROCEDURE § 2725, p. 93-95 (1983)).

FN 15. *Anderson*, 477 U.S. at 254-56, 106 S.Ct. at 2513-14.

requires that the dispute be *genuine* and material.[16] first, [sic] the substantive law will identify which facts are material.[17] Only disputes over facts that might affect the outcome of the suit under the governing law will prevent summary judgment.[18] Second, a dispute about a material fact is genuine is the evidence is such that a reasonable jury could return a verdict for the nonmoving party.[19]

16. All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion.[20] "If the record, viewed in this light, could not lead a rational trier of fact to find"for the nonmovant, summary judgrnent is proper.[21] On the other hand, if "the factfinder could reasonably find in [the nonmovant's] favor, then summary judgment is improper.[22] Finally, even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that "a better course would be to proceed to a full trial."[23]

FN 16. *Willis*, 61 F.3d at 315 (emphasis in original).

FN 17. Id.

FN 18. Id. (citing *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510).

FN 19. Id.

FN 20. *Matsushita Elec. Indus. Co., Ltd.*, 475 U.S. at 587, 106 S.Ct. at 1356.

FN 21. *Kelley v. Price Macemon, Inc.*, 992 F.2d 1408, 1413 (5th Cir. 1993) (citing *Matsushita,* 475 U.S. at 577-78, 106 S.Ct. at 1351), *cert. denied*, 510 U.S. 1043, 114 S.Ct. 688, 126 L.Ed.2d 656 (1994).

FN 22. Id. (citing *Anderson*, 477 U.S. at 249-51, 106 S.Ct. at 2511).

FN 23. *Anderson*, 477 U.S. at 255-56, 106 S.Ct. at 2514; accord *Veillon v. Exploration Services, Inc.,* 876 F.2d 1197, 1200 (5th Cir.1989); 10A C. WRIGHT, A. MILLER & MARY KAY KANE,

III. BIVENS[24] /SECTION 1983 ANALYSIS

17. Plaintiffs have sued the City and County of El Paso, the El Paso Police and Sheriff's Departments, and Defendants Leach, Samaniego, Salas, Holland, Baker and Keith under 42 U.S.C. § 1983. Defendants Leach and Samaniego were sued in their official capacity only, while Defendants Salas, Holland, Baker and Keith were sued in their individual and official capacities. All federal Defendants were sued in their individual capacities under Bivens.[25] Section 1983 provides a remedy to individuals whose constitutional rights have been violated by a person acting under color of state law. Section 1983 is not the source of any rights, nor the source of any substantive law standards shaping the contours of those rights.[26] Rather, it is the vehicle through

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FN 23 (...continued)
FEDERAL PRACTICE AND PROCEDURE § 2728 (1983).

FN 24. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388,91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In *Bivens, the Supreme Court upheld a cause of action for damages against a federal official responsible for injury to a constitutionally protected interest. See Garcia v. United States,* 666 F.2d 960, 962 (5th Cir.), *cert. denied*, 459 U.S. 832, 103 S.Ct. 73, 74 L.Ed.2d 72 (1982).

FN 25. A *Bivens* claim is sustainable only against government officials in their individual capacities. *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1294 (5th Cir.), *cert. denied*, _ U.S. -, 115 S.Ct. 312, 130 L.Ed.2d 275 (1994); *Williamson v. United States Dept. of Agriculture*, 815 F.2d 368, 380 (5th Cir. 1987) (holding that a *Bivens* claim "only applies against the individual appellees in their individual capacities").

FN 26. See *Daniels v. Williams*, 474 U.S. 327,106 S.Ct. 677, 88 L.Ed.2d 662 (1986).

which federal substantive and procedural rights are vindicated.[27]

18. *Bivens* is the federal counterpart of § 1983.[28] In effect, it extends the protections afforded by § 1983 to parties injured by federal actors not liable under § 1983.[29] It affords the victim of unconstitutional conduct by a federal actor or agent a direct remedy under the Constitution.[30] In order to sustain either a *Bivens* or a § 1983 action, a plaintiff must first demonstrate the existence of a right secured by the Constitution or the laws of the United States.[31] In *Maine v. Thiboutot,*[32] the Supreme Court, in interpreting the term "and laws," held that rights created by federal statutory laws may be enforced pursuant to § 1983. Later, the Court held that the word "laws" also encompasses legally binding regulations.[33] There can be absolutely no recovery under either *Bivens* or § 1983 if there has been no deprivation of a federally protected right.[34]

FN 27. *Albright v. Oliver*, 5 10 U.S. 266, 271, 114 S.Ct. 807, 811, 127 L.Ed.2d 114 (1994) (holding § 1983 provides a "method for vindicating federal rights elsewhere conferred").

FN 28. *Abate v. Southern Pacific Transportation Co.*, 993 F.3d 107, 110 n. 14 (5th Cir. 1993).

FN 29. Id.

FN 30. Id. at 110.

FN 31. See *Davis v. Pressman*, 442 U.S. 228, 248, 99 S.Ct. 2264, 2278, 60 L.Ed.2d 846 (1979).

FN 32. 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980).

FN 33. *Wright V. City Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 81 (1987).

FN 34. *Baker v. McCollan*, 443 U.S. 137, 139, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979).

19. Not only does the plaintiff have the burden of showing the existence of a federally protected right, the plaintiff also has the burden of showing that the right was clearly established. In determining whether a particular right was clearly established at the time an official acted, courts typically consider (1) whether the right in question was defined with "reasonable specificity;" (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under pre-existing laws a reasonable official would have understood that his or her acts were unlawful.[35] Here, Plaintiffs claim that at various times their First, Fourth, Fifth and Fourteenth Amendment rights were violated. Needless to say, these are clearly established constitutional rights. Whether any of the named Defendants violated any of these rights, or even whether any of the Defendants can be held liable for possible violations, will be taken up below.

20. Once a plaintiff has established the existence of a federally protected right and that the right has been violated, the court must then decide whether some or all of the state and federal actors are nonetheless immune from suit under one of several immunity doctrines. Here, the immunity being asserted by all individual Defendants, other than Beach and Hines, is qualified immunity. Neither Beach nor Hines can assert qualified immunity because it does not apply to § 1983 suits brought against private individuals (non-public officials) acting under color of law.[36] The grant or denial of qualified immunity is a question of law for the court,[37] and will be discussed at length in the following section. Two things should be noted in conclusion. First, the qualified

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FN 35. See, e.g., *Bradway v. Gonzales*, 26 F.3d 313, 318 (2nd Cir. 1994) (citations omitted).

FN 36. See *Wyatt v. Cole*, 504 U.S. 158, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992).

FN 37. See, e.g., *Bisbee v. Bey*, 39 F.3d 1096, 1099-00 (10th Cir. 1994).

immunity defense is available in both *Bivens* and § 1983 actions.[38] Second, as under § 1983, respondeat superior liability is not available in a *Bivens* action.[39]

IV. QUALIFIED IMMUNITY

21. Each of the federal, state and local defendants has asserted the defense of qualified immunity. The defense of qualified immunity recognized in *Harlow v. Fitzgerald*[40] is a product of the genius of the common law. It is neither a complete barrier to recovery nor a true affirmative defense. Rather, its invocation serves to shift the burdens of pleading and proof in federal civil rights lawsuits brought against public officials for actions or omissions attending their performance of official duties.

22. Although the exact statement of *Harlow* qualified immunity may vary from case-to-case, the Supreme Court and the Fifth Circuit have consistently held that in order for a civil rights defendant pleading Harlow immunity to be liable, defendant's conduct must have violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[41] If reasonable public officials could differ on the lawfulness of the defendant's actions, the

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FN 38. *Abate*, 993 F.3d at 110.

FN 39. *Monell v. Dept of Social Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (I 978); Abate, 993 F.3d at 110.

FN 40. 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

FN 41. *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738; *Anderson*, 483 U.S. at 646 n.6, 107 S.Ct. at 3042 n.6; *Colle v. Brazos County, Texas*, 981 F.2d 237,246 (5th Cir. 1993); *Cooper v. Sheriff, Lubbock County, Texas*, 929 F.2d 1078, 1084 (5th Cir. 1991); *Bennett*, 883 F.2d at 408; *Burzynski Cancer Research Institute*, 819 F.2d at 1309.

defendant is entitled to qualified immunity.[42] Whether the conduct of which the plaintiff complains violated clearly established law is essentially a legal question.[43] Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action assessed in the light of the legal rules that were "clearly established" at the time it was taken.[44] For the legal rules to be considered "clearly established," the contours of the right alleged to have been violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates the right;" that is, "in the light of preexisting law the unlawfulness must be apparent."[45] While there need not have been a specific ruling squarely on point on the issue in question, the law must have been sufficiently

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FN 42. *Johnston,* 14 F.3d at 1059; *White v. Taylor,* 959 F.2d 539, 544 (5th Cir. 1992); *Pfannstiel v. City of Marion,* 918 F.2d 1178, 1183 (5th Cir. 1990).

FN 43. *Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2815; *Johnston*, 14 F.3d at 1059; *White*, 959 F.2d at 544.

FN 44. *Anderson*, 483 U.S. at 639,107 S.Ct. at 3038; *Salas*, 980 F.2d at 310; *Duckett v. City of Cedar Park Texas*, 950 F.2d 272, 279-80 (5th Cir. 1992); *Texas Faculty Association v. University of Texas at Dallas*, 946 F.2d 379,389(5th Cir. 1991); *Pfannstiel*, 918 F.2d at 1183; *Mouille v. City of Live Oak*, 918 F.2d 548, 552-53 (5th Cir.), *cert. denied,* _ U.S. _, 113 S.Ct. 2443, 124 L.Ed.2d 660 (1990); *Bigford v. Taylor*, 896 F.2d 972, 974 (5th Cir. 1990).

FN 45. *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039; *Salas*, 980 F.2d at 310; *White*, 959 F.2d at 544 (5th Cir. 1992); *Bigford*, 896 F.2d at 974; *Brown*, 878 F.2d at 874. *See also Jackson*, 958 F.2d at 620 (applying the Fourth Amendment test for excessive force by police officers that was in effect at the time of the incident made the basis of the plaintiff s complaint in a case in which the defendant pleaded the defense of qualified immunity).

clear to put the official on notice of the impropriety of his actions.[46]

23. The Fifth Circuit has directed courts to examine only Supreme Court and Fifth Circuit precedent in the course of determining whether a legal principle is "clearly established;" the law of other Circuits does not control this determination.[47] The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.[48] For

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FN 46. *See Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 530 (5th Cir. 1996); *Hassan v. Lubbock IS.D.*, 55 F.3d 1075, 1078 (5th Cir.), *cert. denied*, _U.S. _, 116 S.Ct. 532, 133 L.Ed.2d 438 (1995); *Salas,* 980 F.2d at 310; *White*, 959 F.2d at 544 ("If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to immunity."); *Duckett,* 950 F.2d at 279-80; *Streetman,* 91 8 F.2d at 556; *Mouille*, 918 F.2d at 5 52- 53; *Hopkins v. Stice*, 916 F.2d 1029, 10 30-31 (5th Cir. 1990). *See also Brawner v. City of Richardson, Texas*, 855 F.2d 187, 192 (5th Cir. 1988) (holding that "clearly established" means the contours of the right were so clear at the time the officials acted that a reasonable official would have understood that what he was doing violated that right); *Gunaca v. State of Texas*, 65 F.3d 467, 475 n.7 (5th Cir. 1995) ("The question 'is not whether the law was settled, viewed abstractly, but whether, measured by an objective standard, a reasonable officer would know that his action was illegal.'").

FN 47. See *Brady v. Fort Bend County*, 58 F.3d 173, 175-76 (5th Cir. 1995); *Boddie v. City of Columbus, Mississippi*, 989 F.2d 745, 748 (5th Cir. 1993).

FN 48. *Hunter v. Bryant*, 502 U.S. 224,229,112 S.Ct. 534,537,116 L.Ed.2d 589 (1991); *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct 1092, 1096, 89 L.Ed.2d 271 (1986); *Baker,* 75 F.3d at 198; *Brady,* 58 F.3d at 174.

executive officers in general, qualified immunity represents the norm.[49] In addition, merely negligent conduct on the part of a government official cannot meet the rather stringent standard for liability under 42 U.S.C. § 1983.[50]

24. In *Siegert v. Gilley*,[51] the Supreme Court presented the analytical framework for determining whether a plaintiffs allegations are sufficient to overcome a defendant's defense of qualified immunity asserted in a motion for summary judgment.[52] First, the court must determine whether the plaintiff has alleged a violation of a clearly established constitutional right.[53] If the plaintiff fails this step, the defendant is entitled to qualified immunity.[54] If she is successful, the issue becomes the objective legal reasonableness of defendant's conduct under the circumstances.[55]

25. A party seeking damages from an official asserting

FN 49. *See Brady*, 58 F.3d at 174 (quoting *Harlow*, 457 U.S. at 807, 102 S.Ct. at 2732).

FN 50. See *Daniels v. Williams*, 474 U.S. 327, 331-34, 106 S.Ct. 662, 664-67, 88 L.Ed.2d 662 (1986); *Davidson v. Cannon*, 474 U.S. 344, 347-48, 106 S.Ct. 668, 670-71, 88 L.Ed.2d 677 (1986); *Eason v. Thaler*, 73 F.3d 1322, 1329 n.3 (5th Cir. 1996); *Salas*, 980 F.2d at 307; *Streetman*, 918 F.2d at 557 n.3; *Herrera v. Millsap*, 862 F.2d 1157, 1160 (5th Cir. 1989); *Lewis v. Woods*, 848 F.2d 649, 652 (5th Cir. 1988); *Simmons* v. *McElveen*, 846 F.2d 337, 339 (5th Cir. 1988).

FN 51. 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991).

FN 52. *See Baker*, 75 F.3d at 199.

FN 53. Id. (citing *Siegert,* 590 U.S. at 231, 111 S.Ct. at 1792-93).

FN 54. Id.

FN 55. Id. (citations omitted).

Harlow qualified immunity bears the burden of overcoming that defense.[56] Once a government official or employee has asserted qualified immunity and established that the allegedly wrongful acts were undertaken within the scope of his discretionary authority, the burden shifts to the party seeking damages to show that qualified immunity does not bar recovery.[57] It is not enough to carry this burden, as the Plaintiffs have sought to do, by showing that some other law enforcement officer, in the shoes of one of the Defendants, would have acted differently. Instead, there must be a showing that what was done in some way violated the constitution or federal law.

26. The Supreme Court and the Fifth Circuit have repeatedly admonished district courts that the *Harlow* qualified immunity is an immunity from suit [emphasis in original] rather than a mere defense to liability.[58] The Supreme Court and the Fifth Circuit

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FN 56. See *Foster v. City of Lake Jackson*, 28 F.3d 425, 428 (5th Cir. 1994); *Salas v. Carpenter*, 980 F.2d 299, 304 (5th Cir. 1992); *Bennett v. City of Grand Prairie*, 883 F.2d 400, 408 (5th Cir. 1989); *Whatley v. Philo*, 817 F.2d 19, 20 (5th Cir. 1987).

FN 57. *See Todd v. Hawk*, 72 F.3d 443, 446 (5th Cir. 1995); *Schultea v. Wood,* 47 F.3d 1427, 1430 (5th Cir. 1995); *Salas,* 980 F.2d at 306; *United States v. Burzynski Cancer Research Institute,* 819 F.2d 1301, 1310 (5th Cir. 1987), *cert. denied sub nom. Wolin v. United States,* 484 U.S. 1065, 108 S.Ct. 1026, 98 L.Ed.2d 990 (1988); *Saldana v. Garza,* 684 F.2d 1159, 1163 n. 14 (5th Cir. 1982), *cert. denied,* 460 U.S. 1012, 103 S.Ct. 1253, 75 L.Ed.2d 481 (1983).

FN 58. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985); *Salas,* 980 F.2d at 305*; Jackson v. City of Beaumont Police Department,* 958 F.2d 616, 620 (5th Cir. 1992) (holding that one of the principal purposes of the qualified immunity doctrine is to shield officers not only from liability, but also from defending against a lawsuit*); Gaines v. Davis,* 928 F.2d 705, 706-07 (5th Cir. 1991); *Streetman v. Jordan,* 918 F.2d 555, 556 (5th Cir. 1990); *Brown v. Glossip*, 878 F.2d 871, 874 (5th Cir. 1989);

have also strongly encouraged district courts to dispose of § 1983 lawsuits in which qualified immunity claims are apparent from the pleadings without resort to cumbersome and expensive discovery.[59]

27. Once a defendant pleads qualified immunity, the court must first determine whether the plaintiff has asserted a violation of a constitutional right and then whether the defendant's actions were reasonable in light of the law that was clearly established at the time the contested action occurred; until this threshold is resolved, discovery should not be allowed.[60] Currently applicable constitutional standards are used in making the determination as to whether the defendant's conduct violated a constitutionally-protected right.[61] If the plaintiff passes this threshold, the Court must determine whether the defendant's conduct was objectively reasonable under legal principles as they existed at the time of the defendant's acts or omissions.[62]

FN 58 (...continued)
Helton v. Clements, 787 F.2d 1016, 1017 (5th Cir. 1986).

FN 59. *See Anderson v. Creighton*, 483 U.S. 635, 646 n.6, 107 S.Ct. 3034, 3042 n.6, 97 L.Ed.2d 523 (1987); *Mitchell,* 472 U.S. at 526-27, 105 S.Ct. at 2815-16; *Harlow,* 457 U.S. at 818, 102 S.Ct. at 2738; *Jackson,* 958 F.2d at 620; *Gaines,* 928 F.2d at 707; *Streetman,* 918 F.2d at 556-57; *James v. Sadler,* 909 F.2d 834, 838 (5th Cir. 1990).

FN 60. *See Siegert*, 500 U.S. at 232-33, 111 S.Ct. at 1793.

FN 61. Foster, 28 F.3d at 428; *Rankin v. Klevenhagen*, 5 F.3d 103, 106 (5th Cir. 1993).

FN 62. *See Johnston v. City of Houston*, 14 F.3d 1056, 1060 (5th Cir. 1994); *Rankin,* 5 F.3d at 108; *Spann v. Rainey,* 987 F.2d 1110, 1114 (5th Cir. 1992) ("The contour, or standard, for a constitutional right may expand after the time of the alleged violation, and may be the benchmark for proof at trial of that right and its claimed violation; but as stated, the benchmark for objective reasonableness is that which existed at the time of the alleged violation - we look to the

28. The Fifth Circuit Court of Appeals has also repeatedly encouraged the district courts to (1) require highly fact-specific pleading by a plaintiff in a § 1983 lawsuit who attempts to overcome a plea of *Harlow* qualified immunity;[63] and (2) permit limited discovery pending disposition of the qualified immunity issue only in those situations in which the specific facts contained in the plaintiff s pleadings and affidavits are sufficient to defeat the defendant's claims of qualified immunity.[64]

29. "[P]laintiff's must demonstrate *prior to discovery* that their allegations are sufficiently fact-specific to remove the cloak of protection afforded by an immunity defense.[65] A complaint which raises the likely issue of immunity cannot be cast in "broad, indefinite and conclusory terms," but must include detailed facts supporting the

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FN 62 (...continued)
clearly established law at that time.").

FN 63. *See Baker v. Putnal*, 75 F.3d 190, 195 (5th Cir. 1996); *Todd,* 72 F.3d at 446; *Schultea,* 47 F.3d at 1430; *Jackson,* 958 F.2d at 620; *Streetman,* 918 F.2d at 556-57; *Brown,* 878 F.2d at 874; *Geter v. Fortenberry,* 849 F.2d 1550, 1553-54 (5th Cir. 1988); *Jacquez v. Procunier,* 801 F.2d 789, 791-93 (5th Cir. 1986); *Elliott v. Perez,* 751 F.2d 1472, 1480-82 (5th Cir. 1985)

FN 64. *See Gaines*, 928 F.2d at 707; *Brown,* 878 F.2d at 874 n.5; *Geter,* 849 F.2d at 1559-60; *Lion Boulos v. Wilson,* 834 F.2d 504, 507-09 (5th Cir. 1987).

FN 65. *Jackson*, 958 F.2d at 620; *Nieto v. San Perlita IS.D.*, 894 F.2d 174, 177-78 (5th Cir. 1990); *Jacquez*, 801 F.2d at 791; see also *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994); *James v. Sadler,* 909 F.2d 834, 838 (5th Cir. 1990) (holding that questions regarding qualified immunity are resolved on the face of the pleadings and with limited resort to pre-trial discovery).

contention that the plea of immunity cannot be sustained.[66] Discovery related to the applicability of qualified immunity is appropriate *only* when factual issues exist as to the applicability of qualified immunity.[67]

V. APPLICABILITY OF *HARLOW* QUALIFIED IMMUNITY TO LAW ENFORCEMENT OFFICERS

30. Both the United States Supreme Court and the Fifth Circuit have repeatedly held the qualified immunity described in *Harlow* applicable to law enforcement officers performing a variety of activities, including (1) making an arrest,[68] (2) using force to make an arrest,[69] (3) making a traffic stop,[70] (4)

FN 66. *Lion Boulos*, 834 F.2d at 509; *Elliott*, 751 F.2d at 1479.

FN 67. *See Gaines*, 928 F.2d at 707; *Brown*, 878 F.2d at 874 n.5; *Geter*, 849 F.2d at 1553-54; *Lion Boulos*, 834 F.2d at 507-09. In light of the seemingly complex nature of this suit, the court allowed limited discovery before addressing the issues of qualified immunity. More than once, the court has second-guessed the appropriateness of its decision. The only consolation at this juncture is that, given the results of the discovery which did take place, it is clear that no further discovery is needed before addressing the qualified immunity issues.

FN 68. *See Pierson v. Ray*, 386 U.S. 547, 555-57, 87 S.Ct. 1213,1218-19, 18 L.Ed.2d 288 (1967); *Pfannstiel*, 91 8 F.2d at 1183 (5th Cir. 1990); *Trejo v. Perez*, 693 F.2d 482 (5th Cir. 1982); *Saldana*, 684 F.2d 1159.

FN 69. *See Anderson*, 483 U.S. at 639, 107 S.Ct. at 3038; *Jackson*, 958 F.2d at 620; *Pfannstiet*, 918 F.2d at 1184; *Brown*, 878 F.2d at 873-74; but see *Mouille*, 918 F.2d at 553 (5th Cir. 1990) (holding that qualified immunity did not protect a police officer from applying for a warrant,[71] (5) engaging in a warrantless search,[72] (6) conducting a search pursuant to a warrant,[73] and (7) conducting a post-arrest investigation.[74]

VI. LOCAL GOVERNMENT LIABILITY

31. As was noted in the previous section, individual public officers performing discretionary tasks are entitled to assert the protection of *Harlow* qualified immunity. Local governmental entities, however, such as cities, counties and school districts, may not assert qualified immunity in order to escape liability.[75] In *Owen v. City of*

FN 69 (...continued)
liability where he had used force in making an arrest that was clearly unreasonable under established legal principles).

FN 70. *See Gassner v. City of Garland, Texas*, 864 F.2d 394 (5th Cir. 1989).

FN 71. *See Malley*, 475 U.S. at 340, 106 S.Ct. at 1096; *Herrera,* 862 F.2d at 1160.

FN 72. *See Anderson*, 483 U.S. at 642-46, 107 S.Ct. at 303 8-42; *Creamer v. Porter*, 754 F.2d 1311, 1317-19 (5th Cir. 1985).

FN 73 *See Streetman*, 918 F.2d at 556 (5th Cir. 1990); *but contrast James v. Sadler,* 909 F.2d 834, 837-38 (5th Cir. 1990) (holding that qualified immunity would not protect police officers who conducted an unreasonable pat down search of the plaintiff).

FN 74. *See Sanders v. English*, 950 F.2d 1152, 1159 (5th Cir. 1992); *Duckett v. City of Cedar Park, Texas,* 950 F.2d 272, 279-80 (5th Cir. 1992).

FN 75. *See Kentucky v. Graham*, 473 U.S. 159, 167, 105 S.Ct. 3099, 3105-06, 87 L.Ed.2d 114 (1985); *Brandon v. Holt,* 469 U.S. 464, 472-73, 105 S.Ct. 873, 878, 83 L.Ed.2d 878 (1985); *Owen v. City of*

Independence,[76] the Supreme Court held that a municipality is not entitled to qualified immunity even if its officials acted in good faith.

32. Any discussion of municipal liability under § 1983 must begin with *Monell v. New York Department of Social Services.*[77] In *Monell,* female employees of the New York Department of Social Services and the Board of Education of the City of New York brought suit against the Department and its Commissioner, the Board and its Chancellor, and the City of New York and its Mayor under § 1983. All individual defendants were sued in their official capacities only. Plaintiffs complained of the fact that the Board and the Department had an official policy of compelling pregnant employees to take maternity leave without pay before such leave was required for medical reasons.[78] After recounting in great detail the legislative history of Section I (the predecessor to § 1983] of the Civil Rights Act of 1871, the Court first found "that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies."[79]

Wrote the Court:

Local governing bodies, therefore, can be sued directly

FN 75 (...continued)
Independence, 445 U.S. 622, 638, 100 S.Ct. 1398, 1409, 63 L.Ed.2d 673 (1980); *Colle v. Brazos County, Texas,* 981 F.2d 237, 244 & n.36 (5th Cir. 1993) (holding that a municipality does not enjoy § 1983 immunity that might be afforded its officials); *Fields v. City of South Houston, Texas,* 922 F.2d 1183, 1191 (5th Cir. 1991).

FN 76. 445 U.S. at 638, 100 S.Ct. at 1409.

FN 77. 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

FN 78. Id. at 661, 56 L.Ed.2d at 617.

FN 79. Id. at 690, 56 L.Ed.2d at 635.

> under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of a § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very term of the statute, may be sued for constitutional deprivations visited pursuant to a governmental "customs" even though such a custom has not received formal approval through the body's official decisionmaking channels.[80]

Second, as was noted earlier, the Court also held that a municipality cannot be held liable on the basis of *respondeat superior* or vicarious liability.[81]

33. Eight years after *Monell*, the Supreme Court once again took up the question of municipal liability in *Pembaur v. City of Cincinnati.*[82] The specific question facing the Court was whether, and in what circumstances, a decision by municipal policymakers on a single occasion may be construed as a municipal policy or custom of some nature.[83] Reversing the holding of the court of appeals, and relying on its reasoning in *Monell*, the Court found it to be "plain that municipal liability may be imposed for a single decision by municipal

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FN 80. Id. at 690-91, 56 L.Ed.2d at 635.

FN 81. Id. at 691, 56 L.Ed.2d at 636.

FN 82. 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

FN 83. Id. at 471, 89 L.Ed.2d at 457.

policymakers under appropriate circumstances."[84] Writing for the majority, Justice Brennan stated:

> No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body--whether or not that body has taken similar action in the past or intended to do so in the future--because even a single decision by such a body unquestionably constitutes an act of official government policy.[85]

The Court also took the opportunity to sharpen the contours of municipal liability. It sought to emphasize that not every decision by municipal officers automatically subjects the municipality to §1983 liability.

> Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official-even a policymaking official--has discretion in the exercise of a particular function does not, without more, give rise to municipal liability based on an exercise of that discretion. That official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. . . Like other governmental entities, municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances.... We

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FN 84. Id. at 480, 89 L.Ed.2d at 463.

FN 85. Id.

> [,therefore,] hold that municipal liability under § 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.[86]

The holding in *Pembaur* was reaffirmed by a plurality of the justices in *St. Louis v. Praprotnik*.[87]

34. For purposes of liability under § 1983, cities, counties and other local governmental entities are treated the same.[88] The law is well-settled that a suit against a public official in his or her "official capacity" is, in reality, a suit against the governmental entity the official represents.[89] Suing a government official in his "official capacity" is nothing more than a pleading preference.

35. As was established in *Monell* and its progeny, in order to

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FN 86. Id. at 481-83, 89 L.Ed.2d at 464-65 (citations omitted).

FN 87. 485 U.S. 112, 127, 108 S.Ct. 915, 99 L.Ed.2d 107, 120 (1988) (plurality opinion).

FN 88. *See Colle*, 981 F.2d at 244 n.30.

FN 89. *See Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358, 361-62, 116 L.Ed.2d 301 (1991); *Kentucky,* 473 U.S. at 165-66, 105 S.Ct. at 3105; *Brandon,* 469 U.S. at 471-72, 105 S.Ct. at 878; *Brooks v. George County, Mississippi,* 84 F.3d 157, 165 (5th Cir. 1996) (holding that suit against county sheriff in his official capacity was suit against the County); *Baker,* 75 F.3d at 195 (5th Cir. 1996) (holding that claims against a City police chief in his official capacity were really claims against the City); *Bennett v. Pippin,* 74 F.3d 578, 584-85 (5th Cir. 1996); *Sanders,* 950 F.2d at 1159 n.13 (5th Cir. 1992).

recover a judgment against a local government entity under § 1983, a plaintiff must establish that he sustained a deprivation of constitutional or other federally-protected rights as a result of some official policy, practice or custom of that entity. Although occasionally referred to as if they were three distinct creatures, a local government entity's official "policies," "practices" and "customs" are really three different terms for those actions which sufficiently bear the imprimatur of a governmental entity's final policymakers to justify holding that entity responsible for its own actions. An official "policy" is most commonly defined as a policy statement, ordinance, regulation or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy making authority.[90] A municipal "policy" must be the result of a "deliberate and conscious choice" by a municipal policymaker."[91] An official "custom" or "practice," on the other hand, is most commonly defined as a "persistent, widespread practice of city officials or employees," which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy; actual or constructive knowledge of such custom or practice must be attributable to the governing body of the municipality or to an official to whom that body has delegated

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FN 90. *See Eugene v. Alief I.S.D.*, 65 F.3d 1299,1304-05 (5th Cir. 1995); *Colle,* 981 F.2d at 244-45; *Nobby Lobby, Inc. v. City of Dallas,* 970 F.2d 82, 92 (5th Cir. 1992); *Johnson v. Moore,* 958 F.2d 92, 94 (5th Cir. 1992); *Matthias v. Bingley,* 906 F.2d 1047, 1054 (5th Cir.), *modified,* 915 F.2d 946 (1990); *Bennett v. City of Slidell,* 735 F.2d 861, 862 (5th Cir. 1984), *cert. denied,* 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985).

FN 91. *City of Canton v. Harris,* 489 U.S. 378, 38 9, 109 S Ct. 1197, 1205, 103 L.Ed.2d 412 (1989); *Pembauer,* 475 U.S. at 483, 106 S.Ct. at 1300; *Gonzalez v. Ysleta I.S.D.,* 996 F.2d 745, 752-60 (5th Cir. 1993); *Colle,* 981 F.2d at 245; *Rhyne v. Henderson County,* 973 F.2d 3 86, 392 (5th Cir. 1992).

policy-making authority.[92]

36. When the discretionary decisions of a local governmental official are constrained by official governmental policies not of that official's making, the official's disobedience of, or departure from, those policies is not considered an act of the governmental entity for § 1983 purposes.[93] Thus, when a non-policymaking local governmental employee acts in a manner inconsistent with established governmental policy, the governmental employer cannot be held liable therefor under § 1983.[94]

37. Two basic configurations can lead to a municipality's liability under § 1983 for the acts of its officials: (1) a municipality's final policymakers are held effectively to have made policy or condoned the creation of a custom by knowingly ratifying the unconstitutional or illegal actions of subordinate officers or employees, and (2) the municipality may be held liable for the illegal or unconstitutional actions of its final policymakers [emphasis in original] themselves as they engage in the setting of goals and the determination of how those goals will be achieved.[95]

FN 92. *See Colle*, 981 F.2d at 244-45; *Nobby Lobby, Inc.*, 970 F.2d at 92; *Johnson,* 958 F.2d at 94; *Fields,* 922 F.2d at 1192; *Matthias,* 906 F.2d at 1054; *Bennett,* 735 F.2d at 862.

FN 93. *See City of St. Louis*, 485 U.S. at 121-22,108 S.Ct. at 923; *McConney v. City of Houston,* 863 F.2d 1180, 1184 & n.2 (5th Cir. 1989).

FN 94. Id.

FN 95. *See Turner v. Upton County, Texas*, 915 F.2d 133, 136 (5th Cir.), *cert. denied,* 498 U.S. 1069, 111 S.Ct. 788, 112 L.Ed.2d 850 (1991). As discussed at greater length below, a governmental entity's final policymakers in an area are those individuals with the authority to independently perform the joint tasks of (1) setting goals for the

38. As to the first situation, i.e., liability based upon officially-sanctioned custom or practice, isolated instances of official misconduct by a governmental entity's non-policymaking employees are inadequate to prove knowledge and acquiescence by the entity's policymakers;[96] however, sufficiently numerous prior incidents of official misconduct may tend to prove a custom and accession to that custom by municipal policymakers.[97] To succeed, a § 1983 claim

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FN 95 (...continued)
governmental entity in their area of responsibility and (2) selecting the methods by which the governmental entity attempts to achieve those goals.

FN 96. *See Fraire*, 957 F.2d at 1278 (holding that a city's failure to discipline a police officer for an isolated incident involving the alleged use of excessive force to effect an arrest did not give rise to an inference that the city had an official policy authorizing or encouraging police misconduct); *Rodriguez v. Avita*, 871 F.2d 552, 554-55 (5th Cir.), *cert. denied sub nom. Rodriguez v. City of Brownsville*, 493 U.S. 854, 110 S.Ct. 156, 107 L.Ed.2d 114 (1989); *Palmer v. City of San Antonio*, 810 F.2d 514, 516 (5th Cir. 1987); *Bennett*, 728 F.2d at 768 n.3 (5th Cir. 1984) ("Isolated violations are not the persistent, often repeated, constant violations that constitute custom and policy."); *Languirand v. Hayden*, 717 F.2d 220, 227 (5th Cir. 1983) (holding that a § 1983 plaintiff asserting police misconduct must allege a "pattern of similar incidents in which citizens were injured or endangered" by policy-consistent misconduct or that serious incompetence or misbehavior was general or widespread throughout the police force), *cert. denied sub nom. Languirand v. City of Pass Christian, Miss.*, 467 U.S. 1016, 104 S.Ct. 2656, 81 L.Ed.2d 363 (1984); *Berry v. McLemore*, 670 F.2d 30, 33 (5th Cir. 1982), *overruled on other grounds, International Woodworkers of America v. Champion-International Corp.*, 790 F.2d 1174, 1181 (5th Cir. 1986).

FN 97. *See Nobby Lobby, Inc.*, 970 F.2d at 92-93 (holding that the City could be held liable for the numerous seizures by municipal against a municipal entity must be based on the implementation or execution of a policy or custom which was officially adopted by that entity's official policy-makers.[98]

39. The second *configuration*, i.e., liability based upon the official actions of final [emphasis in original] policymakers, has been the subject of several Supreme Court decisions since *Monell*. In *City of Oklahoma v. Tuttle*,[99] a plurality of the Supreme Court held that proof of a single incident of unconstitutional activity is not sufficient to impose liability on the municipality, unless there is proof that it was caused by an existing, unconstitutional municipal policy, attributable to a final municipal policymaker.[100] However, as was noted *supra*,

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FN 97 (... continued)
police of video and other equipment from adult video arcades over a period of two years where the police obtained approval from the City Attorney's office, before commencing the seizures, and the seizures continued even after the City had requested a federal court to stay a lawsuit filed by arcade operators to permit the state courts to first address the state statute relied upon by the police for the seizures); *Matthias*, 906 F.2d at 1054 (holding that a city could be held liable for a persistent, widespread, and longstanding p practice by the police chief for failing to provide adequate notice to the lawful owners of property lawfully-seized by the police of their right to re-claim same prior to disposition thereof by the police, where responsibility for disposing of such property had been delegated by the city to the police chief); *McConney*, 863 F.2d at 1184 & n.2.

FN 98. *Meadowbriar Home for Children, Inc.*, 81 F.3d at 530; *Krueger*, 66 F.3d at 76.

FN 99. 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985).

FN 100. *See Turtle*, 471 U.S. at 823-24, 105 S.Ct. at 2436. That opinion garnered the support of only its author, then-Justice the Court reversed itself in *Pembaur*,[101] and held that municipal liability may, under appropriate circumstances, be imposed for a single decision by final municipal policymakers.[102] One circumstance agreed upon by the Justices in *Pembaur* where such would be the case is that which occurs when a government decisionmaker possessing final authority with respect to an area of government responsibility orders or directly participates in the action that causes the alleged violation of the plaintiff's rights.[103]

FN 100 (...continued)
Rhenquist, Chief Justice Burger, and Justices White and O'Connor. Justices Brennan, Marshall, and Blackmun, concurring only in the judgment, specifically rejected the implication in the plurality's opinion that only existing municipal policies could form the basis for municipal liability where the acts of an official possessing final municipal policymaking authority were at issue. Id., 471 U.S. at 831-32,105 S.Ct. 2440-41.

FN 101. 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

FN 102. *Id.* at 480-81, 106 S.Ct. at 1298-99. The Pembauer plurality, Justices Brennan, White, Marshall, and Blackmun, held that a municipality may be held liable under § 1983) for a single decision by its properly constituted legislative body, regardless of whether that body had taken similar action in the past or intended to do so again in the future, because even a single decision by such a body unquestionably constitutes an act of official government policy. *Id.* at 480, 106 S.Ct. at 1298. Justices Stevens and O'Connor, each writing separately, agreed with this portion of the plurality opinion. *Id* at 491, 106 S.Ct. at 1304. It is clear in this Circuit that a single unconstitutional act by a local governmental entity's final policy-maker can subject that governmental entity to liability under § 1983. *See Bennett,* 74 F.3d at 586 *(citing Brown v. Bryan County, Oklahoma,* 67 F.3d 1174, 1183 (5th Cir. 1995)).

FN 103. *Pembaur*, 475 U.S. at 481, 106 S.Ct. at 1299 ("If the decision to adopt a particular course of action is properly made by

40. Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and whether an official has final policymaking authority is a question of state law.[104] Identifying a final policymaker requires examination of applicable state law regarding the legal authority possessed by local officials.[105] Generally, final policymakers include those local officials who, by virtue of state law, (1) hold virtually absolute sway over the particular tasks or areas of responsibility entrusted to them and (2) are accountable to no one other than the voters for their conduct in those areas.[106] Final policymakers are usually empowered by the state to "define objectives and choose the means of achieving them" without supervision by any other governmental official.[107] For example, under Texas law, County Sheriffs

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FN 103 (...continued)
that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly."); *accord also Brooks,* 84 F.3d at 165; *Brown,* 67 F.3d at 1183 (both holding that a single decision by a final policymakers within the area of his responsibility can impose liability on the responsible governmental entity).

FN 104. *See Pembaur*, 475 U.S. at 483, 106 S.Ct. at 1300 (plurality).

FN 105. *See Bennett*, 74 F.3d at 586; *Doe v. Rains County I.S.D.,* 66 F.3d 1402, 1407 (5th Cir. 1995).

FN 106. *See Turner*, 915 F.2d at 136.

FN 107. *See Colle*, 981 F.2d at 244; *Turner,* 915 F.2d at 136; *Rhode v. Denson,* 776 F.2d 107, 109 (5th Cir.), *cert. denied sub nom. Rhode v. San Jacinto Cty., Texas,* 476 U.S. 1170, 106 S.Ct. 2891, 90

are the final county policymakers in the area of law enforcement.[108] In addition to persons identifiable as final policymakers under state law, the actions of officials who exercise final policymaking authority as a result of a formal delegation of that authority from a local governmental entity's governing body can also provide a basis for holding that governmental entity liable under § 1983.[109] Only the actions of, or policies established by, those local governmental officials who exercise independent, final, decisionmaking authority can create a basis for holding a local governmental entity liable under § 1983.[110] The Fifth

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L.Ed.2d 978 (1986).

FN 108. *See Bennett*, 74 F.3d at 586; *Colle*, 981 F.2d at 224 & n.35; *Turner*, 915 F.2d at 136;
Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980).

FN 109. *See Pembaur*, 475 U.S. at 483, 106 S.Ct. at 1300 (plurality); *Matthias*, 906 F.2d at 1054 (holding a city liable for the illegal actions of a city police chief in connection with the disposition of seized private property where the city had delegated responsibility for the property to the chief); *Crowder v. Sinyard*, 884 F.2d 804, 829 (5th Cir. 1989) (holding that a jury's finding that a city had delegated its final policymaking authority in the area of law enforcement to a city police chief was supported by the evidence and warranted imposing liability upon the city), *cert. denied*, 496 U.S. 924, 110 S.Ct. 2617, 110 L.Ed.2d 638 (5th Cir. 1990).

FN 110. *See Eugene*, 65 F.3d at 1304-05 (holding that a school district could not be held liable based on a school principal's directive to have a parent arrested, despite evidence showing the delegation of considerable authority to the principal because there was no showing the principal had been delegated policymaking authority over school security); *Sanders*, 950 F.2d at 1159 n.13 (holding that a city may be held liable on account of the unconstitutional conduct of city officials only if the city's policy or custom played a part in the violation); *Burns v. City of Galveston*, 905 F.2d 100, 102-03 (5th Cir. 1990) (hoiding that § 1983 liability for a city can only be based on a

Circuit summarized municipal liability best in *Richardson v. Oldham*:[111]

> A municipality is liable under § 1983 "only where the municipality itself causes the constitutional violation at issue." The violation must be caused by a "municipal policy or custom" consisting of a "'deliberate' or 'conscious" choice by city policymakers." This Court has stated that a municipal policy may be established by a persistent pattern of conduct as well as by a formal legal declaration.

41. Municipal liability under § 1983 attaches only when the official responsible for establishing final policy with respect to the subject matter in question makes a deliberate choice to follow a course of action from among various alternatives.[112] Thus, mere negligence

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FN 110 (...continued)
deliberate choice to follow a course of action made by final policymakers); *Worsham v. City of Pasadena,* 881 F.2d 1336, 1240-41 (5th Cir. 1989) (holding that the existence of a council with the authority to review and set aside a city mayor's decision to terminate a municipal employee, which it did, precluded a finding that the mayor possessed final city policymaking authority over the employee's termination and, therefore, also precluded a finding of municipal liability resulting from the mayor's subsequently-vacated action).

FN 111. 12 F.3d 1373, 1381-82 (5th Cir. 1994).

FN 112. See Pembaur, 475 U.S. at 483-84, 106 S.Ct. at 1299-1300 (plurality); *see also City of St. Louis,* 485 U.S. at 121-22, 108 S.Ct. at 923; *Richardson*, 12 F.3d at 1381-82; *Gonzalez*, 996 F.2d at 752-60; Colle, 981 F.2d at 244-45; *Rhyne*, 973 F.2d at 392; *Benavides,* 955 F.2d at 972-73.

on the part of local governmental final policymakers does not give rise to governmental liability under § 1983.[113]

VII. STATUTE OF LIMITATIONS ANALYSIS UNDER 42 U.S.C. §§ 1983, 1985 AND UNDER BIVENS

42. Civil rights actions brought under 42 U.S.C. §§ 1981, 1983, 1995, 1988 and under *Bivens* are deemed analogous to Texas tort actions and, therefore, the applicable limitations period is the two years fixed by Article 5526 of the Vernon's Texas Annotated Statutes, now recodified as TEX.Civ.PRAC.& REM. CODE ANN. § 16.003 (Vernon 1986).[114] Although state law controls which limitations period applies, federal law determines when a cause of action accrues.[115] Under federal law, a cause of action accrues the moment the plaintiff knows or has reason to know of the injury that is the basis of his complaint.[116] Thus, the statute of limitations begins to run from the

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FN 113. *See Collins v. City of Harker Heights*, 916 F.2d 284, 286 (5th Cir. 1990), *aff'd*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992); *see also Daniels v. Williams*, 474 U.S. 326, 331-34, 106 S.Ct. 662, 664-67, 88 L.Ed.2d 662 (1986); *Davidson v. Cannon*, 474 U.S. 344, 347-48, 106 S.Ct. 668, 670-71, 88 L.Ed.2d 677 (1986); *Salas*, 980 F.2d at 307; *Streetman*, 918 F.2d at 557 n.3; *Herrera*, 862 F.2d at 11 60; *Lewis v. Woods*, 848 F.2d 649, 652 (5th Cir. 1988); *Simmons v. McElveen*, 846 F.2d 337, 339 (5th Cir. 1988).

FN 114. *See Heltron v. Clements*, 832 F.2d 332, 334 (5th Cir. 1987) (*citing Kline v. North Texas State University*, 782 F.2d 1229, 1232 (5th Cir. 1986); *Moore v. El Paso County*, 660 F.2d 586, 589 (5th Cir.1981), *cert denied*, 459 U.S. 822,103 S.Ct. 51, 74 L.Ed.2d 57 (1982)).

FN 115. *Id.* at 334; *Rubin v. O'Koren*, 621 F.2d 114, 116 (5th Cir. 1 980).

FN 116. *Moore v. McDonald*, 30 F.3d 616, 620-21 (5th Cir. 1994); *Heltron*, 832 F.2d at 334-3 5; *Rubin*, 621 F.2d at 116.

moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured.[117]

43. In an effort to avert the statute of limitations bar on a majority of their claims, Plaintiffs assert that they were the subjects of a conspiracy,[118] the last over act of which was the execution of two search warrants on November 22, 1993. Thus, argue the Plaintiffs, the statute of limitations did not begin to run until that date, even for all events occurring months or years earlier. A conspiracy may be charged under § 1983 as the legal mechanism through which to impose liability on all of the Defendants without regard to who committed the particular

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FN 117. *Moore*, 303 F.3d at 621 (*citing Gartrell v. Gaylor,* 981 F.2d 254, 257 (5th Cir. 1993) ("the statute of limitations ... begins to run when the plaintiff is in possession of the 'critical facts that he has been hurt and who has inflicted the injury. . . .'") *(quoting Lavelle v. Listi,* 611 F.2d 1129, 1131 (5th Cir. 1980))); *Rubin,* 621 F.2d at 116 *(citing Singleton v. City of New York* 632 F.2d 185, 192 (2nd Cir.), *cert. denied,* 480 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 347 (1980)).

FN 118. Plaintiffs, in essence, make two allegations of conspiracy, although they fail to clearly differentiate between them. Plaintiffs first allege conspiracy under 42 U.S.C. § 1985. They then allege conspiracy under state law. Plaintiffs are not entitled to recover under either theory of conspiracy because all law enforcement Defendants are entitled to qualified immunity and Plaintiffs have not proffered any evidence whatsoever, nor even made an allegation that Defendants Beach and Hines conspired with each other to deprive Plaintiffs of equal protection of the laws. To state a civil rights conspiracy claim under § 1985, Plaintiffs must allege: (1) conspiracy involving two or more persons; (2) for purposes of depriving, either directly or indirectly, any person or class of persons of equal protection of laws; and (3) act in furtherance of conspiracy; (4) which causes injury to person or property, or deprivation of any right or privilege of citizens of the United States. *See Suttles v. United States Postal Service*, 927 F. Supp. 990 (S.D.Tex. 1996).

act, but "a conspiracy claim is not actionable without an action violative of § 1983."[119] In *Pfannstiel,* the court found that when each state action alleged to have harmed the Plaintiffs was determined to be qualifiedly immune, there was no need to reach the issue of whether a conspiracy existed to engage in those actions.[120] Unless Plaintiffs first prove liability as to any of the Defendants under § 1983 or *Bivens*, i.e., that the Defendant or Defendants in question violated a well established constitutional right or federal law and are not entitled to any of the immunities, their conspiracy claim is not actionable. Although the court finds (and discusses below) that Plaintiffs have failed to establish a violation of any constitutional right or federal law, Plaintiffs also encounter another bar to recovery under limitations.

44. While Plaintiffs characterize the events in this case as occurring in the course of a conspiracy, such a characterization does not extend the time when the statute of limitations begins to run. Indeed, Plaintiffs misapprehend the different rules applicable to civil and criminal cases. On the criminal side, the statute of limitations for a federal conspiracy charge does not begin to run until the last overt act pursuant to the conspiracy has been committed.[121] On the civil side, the actionable injury to a plaintiff results from the overt acts of the individual defendants, not from the mere continuation of a conspiracy.[122] Thus, the statute of limitations for a wrongful act, even

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FN 119. *Hale v. Townley*, 45 F.3d 914, 920 (5th Cir. 1995) (citing *Pfannstiel*, 918 F.2d at 1187
(citations omitted)).

FN 120. *Id.* at 920-21 (citing *Pfannstiel,* 918 F.2d at 1187-88).

FN 121. *Heltron*, 832 F.2d at 335 (citing *United States v. Parker,* 586 F.2d 422, 430 (5th Cir.), *cert. denied* 441 U.S. 962, 99 S.Ct. 2408, 60 L.Ed.2d 1067 (1978)).

FN 122. *Turner*, 967 F.2d at 185 ("Critically, the actionable injury in a civil conspiracy flows from the overt acts of the defendants, not from the mere continuation of a conspiracy."); *Heltron,* 832 F.2d at an act done in furtherance of a conspiracy, begins to run when the Plaintiffs knew or should have known of that act, and not when the last over act of the conspiracy transpired.

45. Quoting favorably from the Second Circuit opinion in *Singleton v. City of New York,*[123] the Fifth Circuit wrote:

> Characterizing Defendants' separate wrongful acts as having been committed in furtherance of a conspiracy ... does not postpone the accrual of claims based on individual wrongful acts.... To permit [a plaintiff] to wait and toll the running of the statute simply by asserting that a series of separate wrongs were committed pursuant to a conspiracy would enable him to defeat the purpose of the time-bar, which is to preclude the resuscitation of stale claims.[124]

Therefore, any cause of action against each Defendant accrued as soon as the Plaintiffs knew or should have known of an overt act involved in the alleged conspiracy.

46. Under Texas law, the statute of limitations on a claim for civil conspiracy is two years.[125] The gist of a civil conspiracy is the

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FN 122 (...continued)
335 *(citing Kadar Corporation v. Milbury,* 549 F.2d 230,234 (1st Cir.1977); *Hoffman v. Halden,* 268 F.2d 280,295 (9th Cir.1959), *overruled on other grounds,* 300 F.2d 24(1962)).

FN 123. 632 F.2d 185, 192 (2nd Cir. 1980).

FN 124. Heltron, 832 F.2d at 335.

FN 125. *Smith v. Little*, 903 S.W.2d 780, 786 (Tex.App.-Dallas 1995, no writ); *Connell v. Connell,* 889 S.W.2d 534, 541 (Tex.App.-San Antonio 1994, *writ denied); Coppock & Teltschik v. Mayor, Day & Caldwell,* 857 S.W.2d 631, 639 (Tex.App.--Houston

damage resulting from commission of a wrong which injures another, and not the conspiracy itself.[126] An actionable conspiracy, therefore, consists of wrongs that would have been actionable against the individual conspirators.[127] Generally, then, if an act by one person cannot give rise to a cause of action, the same act cannot give rise to a cause of action when done pursuant to an agreement between several people.[128]

47. Because an allegation of conspiracy does not extend the time period from when the statute of limitations begins to run, and because the statute of limitations for both a claim of conspiracy and any claims brought pursuant to Bivens/§ 1983 is two years from the day Plaintiffs knew or should have known of the alleged wrongs, Plaintiffs' claims against all Defendants, except those who participated in the execution of the November 22, 1993 search warrants, are untimely. Later discussion will show the Defendants to whom limitations are applicable. As to those Defendants, who participated in the execution of the 1993 search warrants, Plaintiffs' conspiracy claims are not actionable because they have failed to state a claim under Bivens/§ 1983 against any of these Defendants.

VIII. FEDERAL TORT CLAIMS ACT ANALYSIS

48. In their fourth cause of action, Plaintiffs allege that

FN 125 (...continued)
(1st Dist.] 1993, *writ denied).*

FN 126. *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 856 (Tex. 1968).

FN 127. Schoellkopf v. Pledger, 778 S.W.2d 897, 900 (Tex.App.-Dallas 1989, writ denied).

FN 128. *Id.*

several of the federal Defendants[129] tortiously interfered with Plaintiffs' prospective contracts, contract negotiations and business relationships with various entities. Specifically, Plaintiffs allege that various agents visited two financial institutions and provided false and misleading information concerning the investigation, which resulted in the financial institutions' dismissal of the Rasmussons as customers. The crux of Plaintiffs' complaint, however, centers on a letter sent to Ford Motor Company by Agent Lappe, requesting that Ford provide all records of its dealings with Rasmark.[130] Plaintiffs maintain that the letter, which informed Ford that one of its employees, Gantkessy, was under investigation for possible involvement in money laundering activities, was defamatory and resulted in Ford terminating its relationship with Rasmark and firing Gantkessy. Because all of Plaintiffs' claims arising out of these incidents lie in tort, and because at the time of these incidents all of the federal Defendants were acting within the course and scope of their employment, Plaintiffs' claims against them will be treated as claims against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671 et seq., and the United States will be substituted as a party Defendant on all state law tort claims. *See* 28 U.S.C. § 2679(d)(1).

49. As the sovereign, the United States is immune from suit unless, and only to the extent-that, it has consented to be sued.[131]

FN 129. The Defendants named are Frost, Lappe, Reay, Wilczewski, Schroeder, King, Brown, Hivic [sic] and Martinez.

FN 130. The letter, which was actually drafted by Agent Frost and only sent under Agent Lappe's signature, was written to Ford on July 26, 1993. Plaintiffs contend that they were not made aware of the letter until April 27, 1996, the day Gantkessy's file was received from his previous attorney, Mr. Antonio Silva. Whether or not this is true is irrelevant for purposes of disposing with this claim.

FN 131. *Saraw Partnership v. United States*, 67 F.3d 567, 569 (5th Cir. 1995); *Truman v. United States,* 26 F.3d 592, 594 (5th Cir. 1994) *(citing F.D.I.C. v. Meyer,* 510 U.S. 471, 474, 114 S.Ct. 996, 1000,

Through the enactment of the FTCA, the government has generally waived its sovereign immunity from tort liability for the negligent or wrongful acts or omissions of its agents who act within the scope of their employment.[132] Specifically, the FTCA allows the government to be held liable in tort for any

> negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). The federal district courts have exclusive jurisdiction to hear claims cognizable under § 1346(b).[133] However, the exceptions to the FTCA's waiver of sovereign immunity that appear in 28 U.S.C. § 2680 limit the federal courts's jurisdiction to hear FTCA claims and, if applicable, bar a suit brought against the government.[134]

Although there is no justification for any court "to read exemptions into the [Federal Tort Claims] Act beyond those provided by

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FN 131 (...continued)
127 L.Ed.2d 308 (1994); *McNeily v. United States,* 6 F.3d 343, 347 (5th Cir. 1993)). *Williamson v. U.S.D.A.,* 815 F.2d 368, 373 (5th Cir. 1987).

FN 132. *Johnson v. United States*, 85 F.3d 217, 218-19 (5th Cir. 1996) (citing *United States v. Kubrick,* 444 U.S. 111, 117-18, 100 S.Ct. 352, 356-57,62 L.Ed.2d 259 (1979)); *Saraw Partnership,* 67 F.3d at 569.

FN 133. Truman, 26 F.3d at 594.

FN 134. *Id.*

Congress,"[135] the exceptions that do appear in the FTCA must be strictly construed in favor of the government.[136]

50. In the Fifth Circuit, plaintiffs bear the burden of proving that defendant's conduct was outside the scope of his employment, without needing to refute the counterweight of the Attorney General's certification as prima facie evidence of scope of employment.[137] The Fifth Circuit decided to follow the approach taken by the First,[138] Seventh,[139] Ninth[140] and Eleventh[141] Circuits in discounting the Attorney General's certification as evidence of the scope of employment. The Court wrote:

> In *S.J & W. Ranch*, the Eleventh Circuit concludes that the Attorney General's scope certification does not warrant judicial deference based on: (1) the interpretation that removal and substitution

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FN 135. *Rayonier, Inc. v. United States*, 352 U.S. 315, 320,77 S.Ct. 374,377, 1 L.Ed.2d 354 (1957).

FN 136. *Truman,* 26 F.3d at 594 (citing *Atorie Air, Inc. v. Federal Aviation Admin.*, 942 F.2d 954, 958 (5th cir. 1991)).

FN 137. *Williams v. United States,* 71 F.3d 502, 506 (5th Cir. 1996).

FN 138. *Nasuti v. Scannell*, 906 F.2d 802, 813 (1st Cir. 1990).

FN 139. *Hamrick v. Franklin*, 931 F.2d 1209, 1211 (7th Cir.), *cert. denied,* 502 U.S. 869, 112 S.Ct. 200, 116 L.Ed.2d 159 (1991).

FN 140. *Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740, 744-45 (9th Cir. 1991).

FN 141. *S.J.& W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1543 (11th Cir.), *cert denied,* 502 U.S. 813, 112 S.Ct. 62, 116 L.Ed.2d 38 (1990), *modified,* 924 F.2d 1555 (11th Cir. 1991).

> determinations under the [Westfall] Act are separate and distinct from scope of employment; (2) the concern that giving a conclusive effect, for purposes of substitution would enhance the power of the executive branch to dictate the judicial branch's subject matter jurisdiction, thereby raising separation of powers issues; (3) the view that the Attorney General does not possess expertise in determining an employee's scope of employment under the applicable state law; and (4) the concern that the highly discretionary nature of the Attorney General's certification may create a high risk of abuse.[142]

Thus, in order to determine whether a federal employee was acting within the scope of his or her employment, the court must apply the law of the state in which the alleged misconduct occurred.[143] In Texas, the stated test for "scope of employment" was set forth by the Texas Supreme Court in *Robertson Tank Lines, Inc. v. Van Cleave*.[144] According to *Robertson*, an employee acts within the course and scope of his employment when his actions are: (1) within the general authority given to him by his employer; (2) in furtherance of the master's business; and (3) for the accomplishment of the object for which he is employed.[145] All federal defendants sued in tort have affied that at all times they were acting in good faith and all of their actions were taken in furtherance of the investigation of Plaintiffs. In fact, Plaintiffs have themselves pled, at one point or another in their complaint, that all law enforcement Defendants "were acting under color of their federal authority, federal laws, statutes, regulations, policies, customs or usages

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FN 142. Williams, 71 F.3d at 505-06.

FN 143. *Palmer v. Flaggman*, 93 F.3d 196, 199 (5th Cir. 1996); *Garcia v. United States*, 62 F.3d 126, 127 (5th Cir. 1995).

FN 144. 468 S.W.2d 354 (Tex. 1971).

FN 145. *Id.* at 359.

or the DEA, USCS, IRS." As such, Plaintiffs have failed to carry their burden of proof on the "scope of employment" issue. The court, therefore, finds that all federal Defendants sued in tort were acting within the course and scope of their employment.

51. Under the FTCA, substantive state law determines whether a cause of action exists and federal law determines when that claim accrues for purposes of the statute of limitations.[146] When the statute of limitations begins to run under federal law was addressed in the section dealing with the statute of limitations. Assuming that Plaintiffs can maintain a cause of action for defamation, misrepresentation and interference with contractual relations, the court need not decide when their causes of action accrued in order to dismiss these claims from the law suit for two reasons. First, in order to maintain a cause of action under the FTCA, Plaintiffs must first have filed a claim with the federal agency or agencies employing the officials responsible for the alleged injury. All of the federal Defendants against whom tort claims were alleged were employed by the Customs Service, the IRS and the FBI. There is absolutely no evidence in the record that Plaintiffs filed claims with these agencies prior to bringing suit in this court. Because the disposition by a federal agency of Plaintiffs' claims is a jurisdictional prerequisite to this court being able to hear the matter, all tort claims asserted against any of the federal Defendants will be dismissed.

52. However, even if Plaintiffs had raised these claims with the above-named federal agencies, which claims were then rejected, the United States would still be immune from suit for the alleged torts. Title 28, United States Code, § 2680(h) provides, in part, that the United States shall be immune from suit for the actions of its employees acting within the scope of their employment that amount to libel, slander, misrepresentation, or interference with contract rights. Assuming, *arguendo*, that Agent Lappe's July 26, 1993 letter was full of misrepresentations and resulted in the injuries claimed by Plaintiffs, loss

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FN 146. *Johnson v. United States*, 85 F.3d 217, 219 (5th Cir. 1996); *Quinton v. United States,* 304 F.2d 234, 235 (5th Cir. 1962).

of business with Ford and termination of Plaintiff Gantkessy's employment, Plaintiffs still could not maintain a cause of action against the United States under the Federal Tort Claims Act. The exclusion from liability of claims concerning misrepresentation applies to negligent as well as intentional misrepresentation.[147] It also covers both affirmative acts of misrepresentation and omissions of material fact.[148] One potential claim raised by Plaintiffs that is actionable under the FTCA against the United States is "abuse of process." However, the court cannot consider the merits of that claim because neither the Rasmussons, nor Rasmark or Gantkessy, have shown any evidence that they raised this claim with any of the above-named federal agencies. Accordingly, this claim will be dismissed as well, as later discussion will reveal.

IX. CONSTITUTIONAL DEPRIVATIONS ASSERTED BY PLAINTIFFS

A. First Amendment

53. All four of the Plaintiffs first complain that their First Amendment right to freedom of association was violated by Agent Lappe's letter to Ford Motor Company and by Agent Frost's alleged visit to several financial institutions. Ford ultimately terminated its relationship with Rasmark and terminated Plaintiff Gantkessy's employment. The two financial institutions also stopped doing business with Rasmark. There is no evidence in the record establishing a causal connection between the letter and Ford's actions. But even assuming, *arguendo*, that the information contained in the letter was the sole reason for Ford's decisions, at most, Plaintiffs have a claim in tort against the government and not a claim against individual federal agents under Bivens for First Amendment violations. The same can be said

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FN 147. *Williamson v. U.S.D.A.*, 815 F.2d 368, 377 & n. 8 (5th Cir. 1987).

FN 148. *McNeily V. United States*, 6 F.3 d 343, 347 (5th Cir. 1993).

about Agent Frost's alleged visit to the financial institutions. Although there is no evidence in the record that the termination of the relationship between the banks and Rasmark had anything to do with any visit by a federal agent, even if it did, Plaintiffs simply have a potential claim in tort and not for First Amendment violations.

54. At the hearing on the various motions, it became evident that Plaintiffs have a fundamental misunderstanding of the right to association protected by the First Amendment. The First Amendment protects an individual's right to join groups and associate with others holding similar beliefs.[149] The core of protections afforded by the First Amendment apply to political belief and association.[150] The right to associate protects an individual's decision to "enter into and maintain certain intimate human relationships."[151] In general, those protected relationships have involved familial settings.[152] The type of associational right claimed by Plaintiff Gantkessy is not the type of right protected by the First Amendment. An association is composed of like minded individuals. Gantkessy's association with Ford was that of

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FN 149. Delaware, 503 U.S. 159, 163, 117 L.Ed.2d 309, 316, 112 S.Ct. 1093 (1992); Aptheher v. Sec. of State, 378 U.S. 500, 507, 12 L.Ed.2d 992, 84 S.Ct. 1659 (1964); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449,460,2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958).

FN 150. *Elrod v. Burns*, 427 U.S. 347, 356, 49 L.Ed.2d 547, 96 S.Ct. 2673 (1976).

FN 151. *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18, 104 S.Ct. 3244, 3249, 82 L.Ed.2d 462 (1984).

FN 152. *Id.* at 619-20, 104 S.Ct. at 3250-51; *see also Copp v. Unified School Dist. No.* 501, 882 F.2d 1547 (10th Cir. 1989) (holding that high school custodian had no First Amendment right to associate generally with high school principal); *Grossart v. Dinaso,* 758 F.2d 1221, 1232 n. 16 (7th Cir. 1985) (holding that right to associate does not include emotional bonds between public employees).

master/servant. In Texas, where the at-will employment doctrine reigns supreme, Gantkessy's relationship with Ford lasted only so long as Ford found it to be beneficial. Unless Gantkessy's employment was governed by contract, Ford had the right to terminate him for whatever reason, good or bad. If Gantkessy feels he was unlawfully terminated, he should take this up with his former employer. As was noted earlier, even if the letter written by Agent Lappe was the ultimate reason for Gantkessy's termination, Gantkessy's claim possibly lies in tort against the federal government, and not under the First Amendment.

55. In the employment context most cases addressing the right of association do so in the context of government employment, and the conditioning of such employment on certain political beliefs or associations. Cases are unanimous in holding that conditioning hiring decisions on political belief and association is unconstitutional unless it can be shown that political affiliation is acceptable criterion for government employment or that the employee's private political beliefs would interfere with discharge of his public duties.[153] In the instant case, Gantkessy was employed by a private company. Even assuming the existence of state action (which would be making quite a stretch), at no time was Gantkessy's employment conditioned on professing certain political beliefs. Gantkessy's termination is simply not actionable under the First Amendment.

56. Likewise, Rasmark's "right of association" with Ford is not the type of association protected by the First Amendment. Rasmark had a contract with Ford and was possibly negotiating another. If Plaintiffs feel that Ford unjustifiably broke its contract with Rasmark, Rasmark is free to pursue a judicial remedy against Ford. If Ford was induced by Agent Lappe's latter to terminate its dealings with Rasmark, then Rasmark has a possible claim for interference with contractual relations, a tort not actionable against the United States under the FTCA. However, neither Gantkessy nor Rasmark had a constitutionally protected right to continued association with Ford. As such, Plaintiffs

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FN 153. *See, e.g., Christy v. Pennsylvania Turnpike Comm'n,* 845 F.Supp. 1097 (E.D.Pa. 1994), *aff'd,* 54 F.3d 1140 (3rd Cir. 1994).

have failed to state a claim against any of the Defendants under the First Amendment. Finally, Rasmark's claim against Agent Frost for interference with its relations with financial institutions is likewise not actionable for First Amendment violations. Since Gantkessy's and Rasmark's only possible claim is against the federal government in tort under the FTCA and since that Act's exclusions disallow such a claim, the court will dismiss Gantkessy's and Rasmark's actions.

B. Fourth Amendment

57. Plaintiffs complain of the execution of the November 22, 1993 search warrants and the collecting of trash from the Rasmusson residence. Plaintiffs first complain that the two search warrants were improperly obtained by Agent Frost. This point is addressed in the final section of the Memorandum Opinion and Order. Second, Plaintiffs complain that several of the Defendants violated their Fourth Amendment rights by foraging through their trash left outside the house. "Trash surveillance" was accomplished in the following manner: The City Sanitation Department was responsible for picking up the trash left on the curbside by the Plaintiffs. Trash collection normally took place two to three times per week. By prior agreement between the City Sanitation Department and the member agencies of the FTF, the trash collected at the Rasmusson residence would be placed in a separate bag and handed off down the route to officers conducting surveillance of the residence. Several of the Defendants who were involved in trash pickups affied that they kept their eye on the trash from the moment it was picked-up until it was handed off. Several of the documents located in the trash were cited in Agent Frost's affidavits.[154] Plaintiffs' Fourth

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FN 154. Plaintiffs spin a different tale as to how the documents in question were obtained. Officer Salas, with whom the reader will soon become acquainted, for a time served as Debra Rasmusson's body guard. During the time of this employment, Plaintiffs allege that Officer Salas obtained a key to their residence. Plaintiffs proffer that Officer Salas served as a mole, outwardly serving as Mrs. Rasmusson's bodyguard, but all along providing intelligence data on the Rasmussons to the Financial Task Force. Plaintiffs, of course, Amendment allegations are addressed below.[155]

58. The Fourth Amendment to the United States Constitution provides in pertinent part that

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause ....

FN 154 (...continued)
ignore the fact that it was Mrs. Rasmusson who approached Officer Salas to serve as her bodyguard. But that is beside the point. According to Plaintiffs, because Officer Salas knew the whereabouts of at least Debra Rasmusson, he would notify Task Force members when no one was home, and would use his house key to place the residence at the disposal of the Task Force members. Once inside, Task Force members would search for incriminating documents. It should be noted that there is not an iota of evidence in the record before the court which lends any credence to Plaintiffs' version. The court recounts their version at some length simply to show how much Plaintiffs are willing to engage in pure speculation totally divorced from reality.

FN 155. Plaintiff Gantkessy has no standing to sue any of the Defendants for any alleged Fourth Amendment violations under § 1983 because he has no privacy interest in the trash collected outside the Rasmusson residence. In order to have Fourth Amendment standing, a Defendant must show (1) an actual, subjective expectation of privacy with respect to the place being searched or items being seized, and (2) that the expectation is one that society would recognize as reasonable. *United States v. Wilson*, 36 F.3d 1298, 1302-03 (5th Cir. 1994); *United States v. Doe,* 801 F.Supp. 1562,1572 (E.D.Tex. 1992) (citing *United States v. Kye Soo Lee*, 898 F.2d 1034, 1037-38 (5th Cir.), *cert. denied*, 500 U.S. 1083, 122 L.Ed.2d 362, 113 S.Ct. 1057 (1990)).

The Fourth Amendment bars only *unreasonable* searches and seizures.[156] The reasonableness inquiry is driven by a balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[157] However, the intrusiveness of the search is not measured so much by its scope as by whether it invades an expectation of privacy that society is prepared to recognize as "reasonable."[158] For the most part, courts look askance at any searches conducted without a warrant. The Supreme Court has determined that warrantless searches and seizures are per se unreasonable unless they fall within a few narrowly defined exceptions.[159] The exceptions include searches on the basis of probable cause or consent.

FN 156. *See United States v. Pierre*, 958 F.2d 1304, 1308 (5th Cir.), *cert. denied,* 506 U.S. 898, 113 S.Ct. 280, 121 L.Ed.2d 207 (1992); *United States v. Brignoni-Ponce,* 422 U.S. 873, 877, 45 L.Ed.2d 607, 614, 95 S.Ct. 2574 (1975) (holding that the Fourth Amendment applies to seizures that involve only a brief detention short of traditional arrest); *Davis v. Mississippi,* 394 U.S. 721, 22 L.Ed.2d 676, 89 S.Ct. 1394 (1969).

FN 157. *Pierre,* 958 F.2d at 1308-09 (citing *New York v. Class,* 475 U.S. 106, 118, 106 S.Ct. 960, 968, 89 L.Ed.2d 81 (I 986)); *see also Delaware v. Prouse,* 440 U.S. 648, 654, 99 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983).

FN 158. *Pierre*, 958 F.2d at 1309 (citing *Katz v. United States,* 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967)).

FN 159. *United States v. Cardenas*, 9 F.3d 1139, 1147 (5th Cir.) (citing *Coolidge v. New Hampshire,* 403 U.S. 443, 454-55, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)), *cert. denied,* 511 U.S. 1134, 114 S.Ct. 2150, 128 L.Ed.2d 876 (1993).

59. Under *Katz v. United States,*[160] no warrantless search is lawful if the accused manifested a reasonable expectation of privacy in the object searched.[161] One cannot, however, manifest a reasonable expectation of privacy in an item once it has been abandoned.[162] The test for determining when an object has been abandoned is one of intent, which "may be inferred from words spoken, acts done, and other objective facts--the question whether the actor has voluntarily discarded or relinquished his interest in the property in question.[163] The accused need not have abandoned the searched item in the strict property sense, where an intent to relinquish ownership must be shown; merely an intent voluntary to relinquish his privacy interest is sufficient.[164] An individual has abandoned his reasonable expectation of privacy when he leaves an item in a public place.[165]

60. While the above-cited cases deal specifically with the

FN 160. 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967).

FN 161. *United States v. Barlow,* 17 F.3d 85, 87 (5th Cir.), *cert. denied,* 513 U.S. 850, 115 S.Ct. 148, 130 L.Ed.2d 88 (1994).

FN 162. *Barlow,* 17 F.3d at 87 (citing *Abel v. United States,* 362 U.S. 217,241, 80 S.Ct. 683, 698, 4 L.Ed.2d 668 (1960); *Hester v. United States,* 265 U.S. 57, 44 S.Ct 445, 68 L.Ed. 898 (1924); *United States v. Colbert,* 474 F.2d 174, 176 (5th Cir. 1973) (en banc)).

FN 163. *Id.* (citing *United States v. Scrivner,* 680 F.2d 1099, 1100 (5th Cir. 1982); *United States v. Colbert,* 474 F.2d 174, 176 (5th Cir. 1973) (en banc)).

FN 164. *See id.*; David H. Steinberg, Note, Constructing Homes for the Homeless? Searching for a Fourth Amendment Standard, 41 DUKE L.J. 1508,1529-32 (1992).

FN 165. *California v. Greenwood,* 486 U.S. 3 5, 40, 108 S.Ct. 1625, 1629, 1 00 L.Ed.2d 30 (1988).

Fourth Amendment in the criminal context, their holdings are equally applicable in the civil context. For Plaintiffs to prevail on their §1983 claim for violations of the Fourth Amendment, they must show that any searches or seizures undertaken by Defendants were unreasonable. Assuming, without deciding,[166] that the pick-up and hand-off of the

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FN 166. Were the court to actually decide whether the sequence in question (the pick-up and delivery of the trash) constituted a search and seizure under the Fourth Amendment, it would look to the open fields doctrine. The open fields doctrine teaches that the Fourth Amendment provides no protection for items on private property outside of a structure or curtilage of a home, or other place where society is prepared to recognize a reasonable expectation of privacy. *United States v. McKeever*, 5 F.3d 863, 867-68 (5th Cir. 1993). The fact that the officer conducting the surveillance violated trespass laws has no relevance to the Fourth Amendment inquiry. *Oliver v. United States*, 466 U.S. 170, 183, 104 S.Ct. 1735, 1743-44, 80 L.Ed.2d 214 (1984); *McKeever*, 5 F.3d at 867-68. In *Hester v. United States*, 265 U.S. 57, 59, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924), the Supreme Court held that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields." *United States v. Eastland*, 989 F.2d 760, 764-65 (5th Cir.), *cert. denied sub nom. Harris v. United States*, 510 U.S. 966, 114 S.Ct. 443, 126 L.Ed.2d 377 (1993). This bright line rule was called into question by *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), which focused Fourth Amendment analysis on the individual's "constitutionally protected reasonable expectation of privacy." *Id.* at 360, 88 S.Ct. at 516 (Harlan, J., concurring). However, in *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735, 80 L.Ed.2d 214 (1984), the Court reconciled *Hester* with *Katz*, by holding that "no expectation of privacy legitimately attaches to open fields." *Id.* at 180, 104 S.Ct. at 1742. It is well-established that the Fourth Amendment does not apply to observations while standing on open fields. *See United States v. Pace*, 955 F.2d 270, 274 (5th Cir.1992) (open fields do not warrant Fourth Amendment protection); *Dow Chemical Co. v. United States*, 476 U.S. 227,239,106 S.Ct. 1819, trash constituted a search within the Fourth Amendment, there is no question that by placing items in a trash bin outside their home, knowing that the trash was going to be picked up by the Sanitation Department, the Rasmussons abandoned any privacy interest they may have had in the items. As such, any claims they are asserting which arise out of the trash pickups against any of the Defendants fail.

C. Fifth And Fourteenth Amendments

61. Plaintiffs' most encompassing complaint seems to be that they were the subjects of an investigation that failed to result in any charges. Plaintiffs complain that the investigation lasted too long, resulting in the loss of business and substantial interference in Plaintiffs' lives. While it is true that the investigation by the FTF did not result in any arrests or charges being brought against the Plaintiffs, Plaintiffs have failed at state a constitutional violation cognizable under § 1983/*Bivens* under either the Fifth or Fourteenth Amendments.

FN 166 (...continued)
1827, 90 L.Ed.2d 226 (1986) (Fourth Amendment does not apply to an aerial surveillance of a 2000 acre industrial complex because it is an open field); *United States v. Dunn*, 480 U.S. 294, 302-05, 107 S.Ct. 1134, 1140- 41, 94 L.Ed.2d 326 (1987) (officer may stand in field and flash light in defendant's barn because "there is no constitutional difference between police observations conducted while in a public place and while standing in the open fields"). The jurisprudence of the Fifth Circuit, see *United States v. Williams*, 581 F.2d 451 (5th Cir.), *cert. denied*, 440 U.S. 972, 99 S.Ct. 1537, 59 L.Ed.2d 789 (1978), holds that three factors are relevant in deciding whether an attachment to a residence falls within the definition of curtilage: (1) the distance between the place in question and the house; (2) whether the place is within a general enclosure that includes the house; and (3) the purpose or use of the questioned place. *United States v. Dunn*, 766 F.2d 880, 884 (5th Cir. 1985) (citing *Care v. United States*, 231 F.2d 22 (10th Cir. 1956), *rev'd on other grounds*, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987).

62. First, there is no constitutional right to be arrested at the point when either the person under investigation or the court deems that there is sufficient probable cause for arrest.[167] Law enforcement officers are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long.[168] Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.[169] Such a requirement would punish the cautious officer who errs on the side of protecting a defendant's rights by requiring a stronger showing of probable cause than the court might deem necessary.[170]

63. Second, there is no constitutional right to be free from official investigation.[171] The *Jacobson* court held that "the mere fact the undercover investigation is started without reasonable suspicion does

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FN 167. *Hoffa v. United States,* 385 U.S. 293, 310, 87 S.Ct. 408, 417, 17 L.Ed.2d 374(1966); *United States v. Adekunle,* 2 F.2d 559, 591 (5th Cir. 1993).

FN 168. *Id.*

FN 169. *Hoffa*, 385 U.S. at 310, 87 S.Ct. at 417.

FN 170. *Adenkunle,* 2 F.2d at 591.

FN 171. *Hale v. Townley,* 45 F.3d 914, 920 (5th Cir. 1995); *United States v. Allibhai,* 939 F.2d 244, 249 (5th Cir. 199 1) *(quoting favorably from United States v. Jacobson,* 916 F.2d 467, 469 (8th Cir. 1990) *(en banc), cert. denied in part,* 499 U.S. 974, 111 S Ct 1618, 113 L.Ed.2d 716 (1991), *rev'd on other grounds,* 503 U.S. 40, 112 S.Ct 1535, 118 L.Ed.2d 174)).

not bar the conviction of those who rise to its bait.'"[172] Since the Fifth Circuit has expressly held that there is no constitutional right either to be free from investigation or to be arrested in the course, or at the conclusion, of the investigation, Plaintiffs have failed to establish the first prong of either the *Bivens* or the § 1983 analysis. As such, all Defendants who participated in the investigation of Plaintiffs are entitled to qualified immunity. Because the Plaintiffs have failed to establish the existence of a constitutional violation, Defendants who participated in the investigation are entitled to qualified immunity without the need for the court to determine whether Defendants' actions were objectively reasonable. The constitutionality of the November 22, 1993 search warrants and of the affidavits supporting the warrants is addressed in the final section of this Memorandum Opinion and Order.

X. DEFENDANTS

A. Supervisory Defendants

1) Carol Hallett, George J. Weise, and John E. Hensley

64. Defendant Hallett was Commissioner of the United States Customs Service from November 1989 to January 1993. Her immediate successor is Defendant Weise, who has served as Commissioner since May 1993. Defendant John E. Hensley, who is currently the Special Agent in Charge of the Los Angeles Field Division of the Customs Service, served as the Assistant Commissioner of the Office of Enforcement in the Customs Service at the time of the events in question. Plaintiffs have made the following allegations against these three Defendants:

> Weise, Hallett, and Hensley failed to supervise, failed to train, failed to discipline, failed to promulgate constitutional policies and procedures and they

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FN 172. *Jacobson*, 916 F.2d at 469.

> acquiesce, approved the harassment strategy that consisted of repeated slander against the Plaintiffs resulting in termination of contractual and employment relationships, and rewarded and promoted the agents for their bad acts carried out against Plaintiffs where said acts were contrary to clearly established law.

All three Defendants have sworn, under penalty of perjury, that they have no personal knowledge of the facts at hand. Although given every opportunity to do so, Plaintiffs have not presented any evidence in the summary judgment record to refute these declarations. Indeed, having read Plaintiffs' complaint, there is little doubt that Plaintiffs seek to hold these three Defendants vicariously liable for the acts of Customs agents.[173]

65. The law is very well settled that supervisory officials cannot be held vicariously liable for their subordinates' actions under § 1983,[174] or likewise, under *Bivens*. Supervising officials may be held liable only if: (1) they affirmatively participate in acts that cause constitutional deprivation; or (2) implement unconstitutional policies that causally result in plaintiff's injury.[175] Plaintiffs have failed to show that these Defendants acted in any way to violate their constitutional rights. It is clear that not one of the three affirmatively participated in any of the investigations concerning Plaintiffs, or even had any knowledge concerning the investigations. Plaintiffs' bald

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FN 173. According to the affidavit of Defendant Hensley, there are at least six levels of command from the agent working at the field office to the Assistant Commissioner.

FN 174. *See Monell*, 436 U.S. at 694, 98 S.Ct. at 2037; *Pierce v. Texas Dept Of Crim Justice, Inst Div.*, 37 F.3d 11446, 1150 (5th Cir. 1994); *Mouille*, 977 F.2d at 929 (5th Cir. 1992); *Thibodeaux v. Arceneaux*, 768 F.2d 737, 739 (5th Cir. 1985) *(per curiam)*.

FN 175. *Baker*, 75 F.3d at 199; *Mouille*, 977 F.2d at 929 (citations omitted) allegations that Defendants have failed to institute constitutional policies, without specifying what those policies may have been or why the current policies violate Plaintiffs' constitutional rights, are not enough to overcome the defense of qualified immunity. The court finds that no genuine issues of fact exist as to Defendant Hallet's, Weise's and Hensley's liability to Plaintiffs. As such, summary judgment in favor of these three Defendants is proper.

2) Michael T. Lappe

66. Agent Lappe was the Special Agent in charge of the United States Customs Office in El Paso, Texas, from May 19,1989 through October 16,1994. During his tenure, the Customs Service participated in a large drug trafficking investigation of the Flores organization. He did not participate in the investigation directly, but was regularly briefed on its progress. Likewise, Agent Lappe did not directly participate in the investigation of the Rasmussons or Rasmark. Here, too, Agent Lappe was intermittently briefed on the progress of the investigation.

67. Agent Lappe's only direct participation in the investigation was the July 26, 1993 letter sent to Ford under his signature. Agent Lappe affied that it was his policy to review and sign all significant correspondence, and that the July 26th letter was prepared for his signature by Agent Frost and routed to him through the regular chain of command. Agent Lappe further affied that he had always known Agent Frost to be reliable and professional in his work and had no reason to question the information contained in the letter.

68. Plaintiff Gantkessy complains that Agent Lappe interfered with his employment at Ford by sending Ford a letter on July 26, 1993. The letter informed Ford that Gantkessy was possibly involved with the Rasmussons, who were then being investigated for violations of numerous federal statutes, and requested that Ford provide the Customs Service with documents of its transactions with Rasmark. The letter briefly outlined the evidence which had been collected up to that time and which indicated a conspiracy to commit fraud by Rasmark

and Gantkessy. The court does not see how the letter sent to Ford was a violation of Gantkessy's constitutional rights.[176] The letter does not unambiguously impute criminal conduct on Gantkessy, nor does it speculate on the possible outcome of the investigation. It simply sets forth facts within the possession of the Customs Service, several of which were provided by Gantkessy himself and asks Ford to provide documents of its dealings with Rasmark. A law enforcement agency is certainly permitted to follow all leads during an investigation, and setting forth the facts from which an investigation is proceeding, even if the investigation does not ultimately result in charges being brought against the suspects, is not a violation of the suspects' constitutional rights. Furthermore, as the court held earlier, Plaintiffs claims, if any, arising out of the letter lie in tort against the federal government under the FTCA and not against individual federal agents.[177] To the extent that Plaintiffs seek to hold Agent Lappe vicariously liable for his subordinates' actions, their claims against him are likewise dismissed.

3) Donald L Reay

69. Special Agent Reay was the Assistant Special Agent in Charge (ASAC) of the El Paso field office for approximately six years from 1990 until 1996. Agent Reay was only marginally involved, if at all, in the investigation of Plaintiffs, and has affirmed, under penalty of pedury, that he has no personal knowledge of the majority of Plaintiffs' allegations. He was not present at the execution of any of the search warrants, nor at any of the interviews involving Plaintiffs. It is obvious that Plaintiffs seek to hold Agent Reay vicariously liable for the actions of his subordinates. For reasons previously addressed in some detail, Plaintiffs' claims against Agent Reay under *Bivens* must fail. Insofar as Plaintiffs' seek to hold Agent Reay liable for his individual actions,

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FN 176. *See Cantu v. Rocha*, 77 F.3d 795, 809 (5th Cir. 1996).

FN 177. In a previous section, the court found that Plaintiffs alleged torts of defamation and interference with contractual and employment relations were not actionable under the FTCA.

Agent Reay is entitled to qualified immunity. Plaintiffs have neither alleged a violation of a constitutional right by Agent Reay, nor argued that Agent Reay acted in an objectively unreasonable manner at any time. As such, all claims against Agent Reay will be dismissed.

B. Defendants Involved in the *Flores* Case

70. Five of the Defendants to this suit had absolutely no involvement in the investigation of the Rasmussons under the auspices of the FTF. Their only connection to any of the events in question was their participation in the Flores investigation in the late-1980's early-1990's. Without exception, upon the termination of the Flores trial, none of the five agents had anything to do with either Flores or Mark Rasmusson. As concerns the statute of limitations for any causes of action against these Defendants, there is no question that Plaintiffs knew or should have known of these agents' role in the investigation at the time of the Flores trial. Thus, Plaintiffs' claims against these agents are untimely. More importantly, however, all of the agents who testified at the Flores trial are absolutely immune from civil liability arising from their testimony at trial.[178] Accordingly, not only are any possible claims asserted under *Bivens* against the following five Defendants time barred, Plaintiffs have failed to state any actionable claims against them. As such, all claims against the following five Defendants are dismissed.

1) Robert Martinez

71. Agent Martinez, a Special Agent with the Internal Revenue Service, was sued for violating the Plaintiffs' First, Fourth, Fifth and Fourteenth Amendment rights. Plaintiffs have not made any specific allegations as to how Agent Martinez violated their constitutional rights. In fact, Agent Martinez has never had any contacts with Plaintiffs whatsoever. In 1990, Agent Martinez was assigned to a

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FN 178. *Briscoe v. LaHue*, 460 U.S. 325, 329-30, 103 S.Ct. 1108, 1112-13, 75 L.Ed.2d 96 (1983).

task force investigating drug trafficking in the El Paso area. Specifically, the task-force was investigating Jesus Flores and his drug running operation. After Flores was indicted by an El Paso grand jury, Agent Martinez testified on behalf of the government at Flores's trial. That was the Agent's only involvement in any tangential matter noted in Plaintiffs' Third Amended Complaint. Agent Martinez was not involved in any investigation of the Plaintiffs, before or after Flores's conviction. For the reasons stated above, all claims asserted against Agent Martinez will be dismissed.

2) Elias P. Chavez

72. DEA Special Agent Elias P. Chavez has also been sued by the Plaintiffs under *Bivens* for violating their constitutional rights. Like Agent Martinez, Agent Chavez was involved in the Flores investigation in 1990. His role consisted of interviewing a number of individuals who either worked with Jesus Flores in the drug trafficking organization or else had evidence of activities of the Flores organization. Agent Chavez declared that he has had no contacts with any of the Plaintiffs since that time. Accordingly, Plaintiffs' claims against Agent Chavez are likewise barred by the statute of limitations and by absolute testimonial immunity.

3) Rafael Aguirre

73. DEA Special Agent Rafael Aguirre was assigned to the DEA El Paso District Office from April 1990 through June or July 1992. During that time, he served as group supervisor of an enforcement group. At the time of his arrival, several DEA agents from the El Paso office were involved in an ongoing investigation of Jesus Flores and his drug trafficking organization. As group supervisor, Agent Aguirre was required by DEA policy to review and sign all of the reports generated during the investigation. After Flores was convicted, Agent Aguirre had no further role in investigating Flores associates or any of the Plaintiffs in the case at hand. Accordingly, Plaintiffs' claims against Agent Aguirre are untimely and will be dismissed.

4) Thomas P. Lenox

74. DEA Special Agent Thomas P. Lenox was assigned to DEA's El Paso District Office from February 1991 through March 1991. During that time, he participated in the Organized Crime Drug Enforcement Task Force (OCDETF) investigation of Jesus Flores and his organization. In the course of that investigation, Task Force agents became aware that the Flores organization was using Rasmark Jet Charter, Inc. for its transportation needs. The agents also learned that Rasmark treated the Flores organization differently from its other customers, by not keeping documentation of flights and by dealing primarily in cash, for instance. In September 1990, a federal grand jury indicted Flores and several of his associates on drug trafficking charges. Mark Rasmusson was among the accused. On September 26, 1990, Agent Lenox, along with Agent Perkins, contacted Mr. Rasmusson and his attorney to inform them that there was a wan-ant out for Mr. Rasmusson's arrest. Since Agent Lenox left El Paso in March 1991, he had almost nothing to do with the Flores investigation or the subsequent investigation of the Plaintiffs. Accordingly, any and all claims against Agent Lenox are barred by the applicable statute of limitations.

5) Steven Perkins

75. DEA Special Agent Steven Perkins was assigned to DEA's El Paso District Office from Austin 1987 until March 1991. While there, he participated in the investigation of the drug trafficking operation run by Jesus Flores and his associates. At some point during the investigation, evidence surfaced that the Flores organization was using Rasmark for its transportation needs. Plaintiff Mark Rasmusson then became implicated in the investigation, but was never its primary focus. An El Paso grand jury handed down nine indictments as a result of the Flores investigation. Mr. Rasmusson was among those indicted. He was charged with one count of aiding and abetting in drug trafficking activities. As noted earlier, Agents Lenox and Perkins contacted Mr. Rasmusson and his attorney to inform them that a warrant had been issued for Mr. Rasmusson's arrest. Mr.

Rasmusson turned himself in the next day. Agent Perkins was transferred to Casper, Wyoming prior to the commencement of the Flores trial. He returned to El Paso for a portion of the trial and the sentencing, but did not participate in any further investigations of the Flores associates or of the Plaintiffs. Since Agent Perkins's involvement has been known to the Plaintiffs since at least 1991, their claims against him are barred by the statute of limitations.

76. Plaintiffs have also alleged that Agent Perkins falsified his DEA-6 reports, which served to secure Mark Rasmusson's indictment in 1990. If Plaintiffs are asserting a claim for malicious prosecution,[179] their claim is barred by the applicable statute of limitations.[180] If Mr. Rasmusson is alleging a violation of his constitutional right to be free from an investigation, his claim likewise fails.[181]

FN 179. In order to prevail on a malicious prosecution claim in Texas, the Fifth Circuit requires the plaintiff to show that (1) a criminal action was commenced against him; (2) the prosecution was caused by the Defendant or with his aid; (3) the action terminated in the Plaintiff s favor; (4) the Plaintiff was innocent; (5) the Defendant acted without probable cause; (6) the Defendant acted with malice; and (7) the criminal proceeding damaged the Plaintiff. *Taylor v. Gregg*, 36 F.3d 453, 455 (5th Cir. 1994) (citations omitted).

FN 180. *See Toranto v. Wall*, 891 S.W.2d 3, 6 (Tex.App.--Texarkana 1994, no writ) (noting that a civil action for malicious prosecution is governed by a two year statute of limitations).

FN 181. There is no constitutional right to be free from an official investigation. *Hale v. Townley*, 45 F.3d 914, 920 (5th Cir. 1995); *United States v. Allibhai*, 939 F.2d 244, 249 (5th Cir. 1991) (citations omitted), *cert. denied*, 502 U.S. 1072, 112 S.Ct. 967, 117 L.Ed.2d 133 (1992).

C. Local Entity Defendants

1) El Paso Police Department and El Paso County Sheriff's Department

77. The capacity of an entity such as a sheriffs department or a police department to sue or be sued "shall be determined by the law of the state in which the district court is held."[182] In Texas, county sheriffs and police departments generally are not legal entities capable of being sued, absent express action by the political entities under which they exist (the county, in the case of the sheriff s department; the city, in the case of the police department) "to grant the servient agency with jural authority."[183] Unless the superior political entity takes explicit steps to grant the servient agency with jural authority, the agency cannot engage in any litigation except in concert with the governmental unit itself.[184] While *Darby* dealt specifically with a police department, the Fifth Circuit's reasoning has been equally applied to suits against sheriff s departments.[185]

FN 182. FED.R.Civ.P. 17(b).

FN 183. *Jacobs v. Port Neches Police Dept.*, 915 F.Supp. 842, 843 (E.D.Tex. 1996) (citing *Darby v. Pasadena Police Dep't,* 939 F.2d 311, 313 (5th Cir.1991)).

FN 184. *Id.* at 313; *see also Darby,* 939 F.2d at 313 (noting that if a governmental subdivision does not have the capacity for independent legal action, it is incapable of being joined as a defendant).

FN 185. *See, e.g., Rideau v. Jefferson Cty.*, 899 F.Supp. 298, 301 (E.D.Tex. 1995) ("The United States Court of Appeals for the Fifth Circuit has determined that police and sheriff s departments are governmental subdivisions without capacity for independent legal action.") (citing *Darby v. Pasadena Police Dept,* 939 F.2d 311 (5th Cir.1991); Alcala v. Dallas County Sheriff, 988 F.2d 1210 (5th Cir.1993)).

78. The City of El Paso is a home rule municipality. The Texas Code grants all authority to organize a police force to the city itself,[186] and the Home Rule Charter of the City of El Paso in turn reserves to the municipality itself the right to sue and to be sued.[187] Likewise, the El Paso Sheriff s Department is not a separate legal entity, but is a governmental subdivision of El Paso County.[188] In addition, there is no indication that El Paso County has taken explicit steps to endow the Sheriff s Department with jural authority. Because there is no indication that the either the El Paso County Sheriff's Department or the El Paso Police Department enjoy a separate legal existence, they are not proper parties to this lawsuit, and all causes of action against them will be dismissed.

79. In cases such as this, where an improper political entity has been sued, and is subsequently dismissed, the *Darby* court held that, under most circumstances, the district court should grant plaintiffs leave to amend their complaint and sue the proper party, especially when the proper defendant was on notice all along and is not prejudiced by being named a party defendant. Here, the proper parties in a suit against the Sheriff s Department and the Police Department are El Paso County and the City of El Paso, respectively. Since these two entities have already been named as Defendants in the case *sub judice*, there is no need for the court to decide whether Plaintiffs should be granted leave to amend their complaint.

FN 186. *See* TEX. LOCAL GOV'T CODE ANN. § 341.003.

FN 187. *See* Affidavit of Alternate City Clerk Gloria T. Alvarado in Support of Motion for Summary Judgment ("Tbe City of El Paso and the El Paso City Code and its charter do not grant to the El Paso Police Department the right to sue or be sued, such litigation being reserved for the City of El Paso itself.").

FN 188. *See generally* TEX. CONST. ART. 5, § 23; TEX. LOCAL GOV'T CODE ANN. § 85.001 et seq.

2) El Paso County Sheriff Leo Samaniego and Chief of Police Russ Leach

80. In *Kentucky v. Graham*,[189] the United States Supreme Court sought to eliminate lingering confusion about the distinction between personal- and official-capacity suits.[190] The *Graham* Court emphasized that official-capacity suits "'generally represent only another way of pleading an action against an entity of which an officer is an agent.'"[191] Suits against state officials in their official capacity, therefore, should be treated as suits against the State.[192] Similarly, suit against El Paso County Sheriff Leo Samaniego, in his official capacity, should be treated as a claim against El Paso County,[193] and suit against Chief of Police Russ Leach, in his official capacity, should be treated as a claim against the City of El Paso. Since both El Paso County and the City of El Paso are party Defendants to this law suit, it serves no legitimate purpose whatsoever to retain the two top law enforcement officials in their official capacities as party Defendants. Accordingly, all claims brought against El Paso County Sheriff Leo Samaniego and all claims brought against Chief of Police Russ Leach will be dismissed.

3) City of El Paso and El Paso County

81. Plaintiffs have alleged that El Paso County had an unconstitutional policy in place governing cooperation of the Sheriff s

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FN 189. 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).

FN 190. *Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.Ed.2d 301 (1992).

FN 191. Id. (citing Graham, 473 U.S. at 165, 105 S.Ct. at 3104 (quoting Monell, 436 U.S. at 690, n.55, 98 S.Ct. at 2035, n. 55)).

FN 192. *Id.*

FN 193. *See Brooks*, 84 F.3d at 165 (5th Cir. 1996).

Department in multi-agency drug task forces. This allegation is discussed in more detail below. Although Plaintiffs also allege that the City of El Paso also has unconstitutional policies in place, Plaintiffs were unable to point to a single City Ordinance or rule with which they take issue. In addition to alleging the existence of unconstitutional policies, Plaintiffs complain that both the Sheriff s Department and the Police Department failed to adequately train and supervise their officers. Because neither the Sheriff s Department nor the Police Department are proper parties to this lawsuit for reasons set out above, the failure to train and supervise claim will be treated as a claim against the County and City, respectively.

82. At the April 21st hearing on all outstanding motions, the court asked Plaintiffs to point out what policy or custom of the County they contended was unconstitutional, or whose enforcement violated their constitutional rights. Plaintiffs pointed the court to the standards of conduct governing the El Paso County Metro Narcotics Task Force. Like the FTF, the County Metro Narcotics Task Force is a multi-agency task force composed of local state and federal agencies. The County Metro Narcotics Task Force, however, had nothing to do with investigating Plaintiffs. Absent any sort of direct injury to Plaintiffs arising out of the actions of the County Metro Narcotics Task Force, Plaintiffs have no standing to challenge any possible constitutional violations. Even if Plaintiffs did have standing, assuming that the Standards of Conduct were promulgated by the County, the court fails to find that any provision of the Standards is unconstitutional. Other than this one document, Plaintiffs have failed to point to any County policy or practice which governed the participation of the Sheriff's Department in the FTF and was unconstitutional as adopted or applied. Accordingly, all claims against the City and County of El Paso on grounds that the two had in place unconstitutional policies or customs will be dismissed.

83. Plaintiffs have next sought to premise liability on the basis of failure to supervise or train. Municipal liability under § 1983 for failure to train or supervise was outlined by the Supreme Court in

Canton v. Harris County.[194] The *Canton* court first reaffirmed that the initial inquiry in any case- alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.[195] *Canton* held that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.[196] The Court reiterated the admonitions it gave in *Monell*[197] and Polk Cty. v. Dodson[198] that a municipality can be liable under § 1983 only where its policies are the "moving force [behind] the constitutional violation." Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983.[199] Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality--a "policy" as defined by the Supreme Court's prior cases--can a city be liable for such failure under § 1983.[200] It is worth quoting at length the following passage from the Court's opinion, as it succinctly sets forth the law of municipal liability for failure to train:

> *Monell's* rule that a city is not liable under § 1983 unless a municipal policy causes a constitutional deprivation will not be satisfied by merely alleging that

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FN 194. 489 U.S. 378, 103 L.Ed.2d 412, 109 S.Ct. 1197 (1989).

FN 195. *Id.* at 385, 103 L.Ed.2d at 424.

FN 196. *Id.* at 388, 103 L.Ed.2d at 426.

FN 197. 436 U.S. at 694, 56 L.Ed.2d at 611.

FN 198. 454 U.S. 312, 326, 70 L.Ed.2d 509, 102 S.Ct. 445 (1981).

FN 199. *Canton*, 489 U.S. at 389, 103 L.Ed.2d at 426-27.

FN 200. *Id.* at 389, 103 L.Ed.2d at 427.

> the existing training program for a class of employee's, such as police officers, represents a policy for which the city is responsible. That much may be true. The issue in a case like this one, however, is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy. It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But is may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.[201]

It is not enough for Plaintiffs to simply allege that either the City or the County had an inadequate training program. Plaintiff s must not only point to alleged inadequacies, but must prove that any deficiencies in training actually caused the complained of injuries.[202] Finally, the fact that a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the City or County, for the officer's shortcomings may have resulted from factors other than a faulty training program.[203] Plaintiffs have been unable to point to any specific deficiencies in either the City's or County's training programs of its law enforcement officers. Mere allegations of inadequate training, without more, are not enough to overcome summary judgment. Accordingly, Plaintiffs' failure to train complaint against the City and County of El Paso will be dismissed.

FN 201. *Id.* at 389-90, 103 L.Ed.2d at 427 (footnotes omitted).

FN 202. Id. at 391, 103 L.Ed.2d at 428.

FN 203. *Id.* at 390-91, 103 L.Ed.2d at 428.

84. Plaintiffs have also alleged a failure-to-supervise claim against both the County and City of El Paso. To plead a valid failure-to-supervise claim, Plaintiffs must allege facts sufficient to present the following elements: (1) the City and County Defendants learned of facts or a pattern of inappropriate conduct by its law enforcement officers that points plainly toward the conclusion that the subordinates violated Plaintiffs' constitutional rights; (2) the City and County Defendants demonstrated deliberate indifference toward the constitutional rights of the Plaintiffs' by failing to take action that was obviously needed to prevent or stop the abuse; and (3) such failure caused a constitutional injury to the Plaintiffs.[204] Other than making conclusory allegations that the County and City failed to properly supervise its law enforcement officers, Plaintiffs have not alleged any set of facts which would show that either the City or the County knew of unconstitutional conduct by its law enforcement officers, or, even if the City or County knew of alleged unconstitutional conduct, they were deliberately indifferent to Plaintiffs' plight. Because Plaintiffs' have been unable to show the existence of a genuine issue of material fact as to any claim against the County or City of El Paso, summary judgment is proper in favor of both entities.

D. El Paso Police Defendants

1) George Salas

85. Officer Salas has been employed as a uniformed patrolman by the El Paso Police Department since 1977. In January 1992, while he was working as a uniformed patrolman, Officer Salas was dispatched to Rasmark corporate offices to receive a report about a threatening telephone call. He was met by Mark and Debra

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FN 204. *See, e.g., Doe v. Hillsboro Indep. Sch. Dist.*, 81 F.3d 1391, 1404 (5th Cir. 1996) (citing *Hagan v. Houston Indep. Sch Dist.*, 51 F.3d 48, 51 (5th Cir. 1 995); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 454 (5th Cir.), *cert. denied sub nom. Lankford v. Doe,* 513 U.S. 70, 115 S.Ct. 70, 130 L.Ed.2d 25 (1994).

Rasmusson, who were both very disturbed by a message that had been left on their answering machine. Officer Salas took down all of the information and told the two to be careful. Before he left, Debra Rasmusson asked for his telephone number.

86. According to Officer Salas's affidavit, he received a telephone call from Ms. Rasmusson two weeks later. Ms. Rasmusson inquired whether he would be available for private security work. In the next three months, Officer Salas provided private security services about a half-a-dozen times. Then, on May 23, 1992, Officer Salas received a telephone call from Ms. Rasmusson, who told the Officer that she was afraid for her life because of her husband, and that she had documents that could put him away for a long time. Officer Salas, who had previously been introduced to Agent Frost, the lead agent leading the Rasmusson investigation, immediately telephoned the Agent and arranged for a meeting. He then picked up Ms. Rasmusson and her son and drove them to a pre-arranged meeting place. Once everybody had congregated, the procession moved to the Customs Offices, where Ms. Rasmusson met with Agent Frost. Officer Salas did not sit in on that conversation. Apparently, the conversation went badly because Ms. Rasmusson stormed out of the building and intentionally triggered the fire alarm on her way out. She refused to have Officer Salas drive her home and that was the last contact the two of them had until the summer of 1995, when Ms. Rasmusson telephoned and confessed that she had an alcohol and drug problem. Officer Salas simply suggested that she seek help from Charter Hospital.

87. Officer Salas further affied that he did not participate in any FTF activities. He was never called upon to undertake surveillance of the Plaintiffs or their place of business, was never asked to assist in interviewing any individual witnesses and never participated in the execution of search warrants. His only connection to Plaintiffs is that he served as Ms. Rasmusson's body guard on several occasions. Still, Plaintiffs seek to ensnare Officer Salas in a web of conspiracy they have cast far and wide.

88. Debra Rasmusson paints a different story of Officer Salas's involvement in the case. According to Ms. Rasmusson, she and

her husband had received a threatening telephone message at their office and had reported the incident to the El Paso Police Department. Officer Salas and his partner came out to investigate. Officer Salas then gave his telephone number to Ms. Rasmusson, who contacted the Officer a few weeks later to request private security services. Here is where the stories diverge. According to Ms. Rasmusson, Officer Was came by her residence unannounced a few days after the telephone call. One thing led to another and the two became involved in an illicit affair The affair lasted until May 1992. Ms. Rasmusson contends that on one occasion, while Officer Salas was at her residence, he received a call on his beeper from the office. Apparently not wanting his supervisor to know he was at the Rasmusson residence, Officer Salas asked Debra Rasmusson to borrow her car so that he could make a telephone call from a convenience store down the street. Ms. Rasmusson obliged and gave Officer Salas the keys to her car. The key chain which held the car keys also contained keys to the house and the office. Ms. Rasmusson contends that Officer Salas took that opportunity to make a copy of the house and office keys. This is the Plaintiffs' explanation as to how certain documents were obtained by Task Force members. Ms. Rasmusson also states that at the May interview with the Customs agents, Agent Frost told her that Officer Salas was a mole spying on the Rasmussons for the FTF.

89. While there is absolutely no evidence in the record, other than Mrs. Rasmusson's own assertions, substantiating the events just relayed, even if everything Mrs. Rasmusson states is true, Plaintiffs have still failed to state a claim under § 1983 against Officer Salas. Plaintiffs have not alleged any acts against Officer Salas that constitute a violation of their constitutional or statutory rights. Thus, Officer Salas is entitled to qualified immunity against any claims arising out of his conduct as a police officer. If Plaintiffs' claims against the Officer lie in tort, those claims, as well as all claims brought under § 1983, are time barred. Regardless of whose version of events is believed, the last contact Debra Rasmusson had with Officer Salas was in May 1992. Thus, all claims brought against him are untimely.

2) James Holland

90. Officer Holland has been an officer with the El Paso Police Department since January 6, 1972. From January 1993 until April 1995, Officer Holland was the El Paso Police Department's representative on the Financial Task Force investigating money laundering in the El Paso area. While on the Task Force, he participated in surveillance operations and aided in the execution of search warrants. On three occasions, Officer Holland picked up trash collected from the Rasmusson residence. This was accomplished not by rummaging through their trash bin, but by waiting for the trash to be collected by the sanitation department, and then getting it from them down the road.[205] Officer Holland also participated in executing a search warrant on November 22, 1993 at the Rasmusson residence. Not only have Plaintiffs failed to allege a constitutional violation against Officer Holland, Plaintiffs have failed to timely bring any claims they may have had against him. Suit against Officer Holland was not filed until May 10, 1996, more than two years after the last act alleged against him by the Plaintiffs in their complaint. There is no question that Plaintiffs knew or should have known the officers involved in the execution of the search warrants, thereby starting the running of the statute of limitations.

E. Deputy Sheriff's Defendants

1) Neil Baker

91. Sheriff s Deputy Baker was temporarily assigned by the Sheriff s Department to the FTF. While working on the Task Force, Deputy Baker conducted surveillance and retrieved trash from the sanitation department. He also participated in the execution of the November 22, 1993 search warrant at Rasmark corporate offices. In regard to the trash pick-up, Plaintiffs have not alleged a constitutional

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FN 205. The court held, *supra*, that this activity was not a violation of Plaintiffs' Fourth Amendment rights.

violation and, as such, Deputy Baker is entitled to qualified immunity from suit. Even if the act did constitute a constitutional violation, which it does not, there is nothing in the record to controvert the fact that Deputy Baker acted in an objectively reasonable manner. Plaintiffs have likewise failed to allege a constitutional violation with respect to the execution of the November 23, 1993 search warrants.[206] But even if Plaintiffs could successfully challenge the basis on which the warrant was obtained, all individuals involved in the execution of the search warrants have affied that the warrant was facially valid. These officers, including Deputy Baker, are entitled to qualified immunity for their reliance on a facially valid search warrant issued by a neutral magistrate. Accordingly, all claims against Deputy Baker will be dismissed.

2) Jerry Keith

92. Like Deputy Baker, Deputy Keith was temporarily assigned by the El Paso Sheriff's Department to work on the Financial Task Force. And, like Deputy Baker, Deputy Keith performed some surveillance work and participated in trash pick-ups. He did not, however, participate in executing any of the search warrants on November 22, 1993. Plaintiffs have failed to state any constitutional or statutory violations against Deputy Keith. As such, Deputy Keith is entitled to qualified immunity from suit. Accordingly, all claims against him will be dismissed.

F. Private Defendants

1) Gail Beach and Chris Hines

93. According to Plaintiffs' complaint, Aero Freight, Inc. acted as a freight broker for Rasmark Jet Charters, Inc. from 1984 through 1987. Defendant Beach is the owner of Aero Freight, Inc. and Defendant Hines is one of its employees. Apparently, Aero Freight had

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FN 206. See Section H, *infra*.

made Rasmark its exclusive carrier, but terminated that exclusive relationship when it bought its own Lear jet. Plaintiffs complain that Defendants Hines and Beach provided false information to law enforcement officers in order to "do in" their competitor, Rasmark. Plaintiffs' complaint reads:

> On March 9, 1993, Defendants Frost and Mills ... conducted an interview with Gail Beech (sic), owner of Aero Freight of El Paso, a direct competitor, and former business associate, of Rasmark. Majority, if not all, of the information that Gail Beach told to Frost and Mills were based on rumors and disinformation that she had heard, mainly from former, disgruntled employees. Beach told the agents that her information was based largely on rumors.

Plaintiffs complain that Defendant Frost then used the information given him by Defendant Beach in an affidavit supporting his request for a search warrant on November 19, 1993. Task Force agents also met with Defendant Hines on March 16, 1993. Plaintiffs allege that Defendant Hines engaged in misinformation and rumormongering, and that his statements also made their way into Agent Frost's November 19, 1993 affidavits.

94. Both Defendants Beach and Hines have signed affidavits stating that they met with Task Force agents only one time each, on March 9 and March 16, 1993 respectively. Furthermore, both Defendants have affied that, at all times, they responded truthfully to the questions posed and provided information in good faith. Customs Agents Schroeder and Frost, also Defendants in this lawsuit, have corroborated Beach's and Hines's affirmations. Agent Schroeder, who interviewed Defendant Hines on March 16, 1993, affied that he called Hines five to six times after the interview to clarify details previously discussed and that no contact with Hines was made after July 1993. Likewise, Agent Frost, who interviewed Defendant Beach, affied that other than a few post-interview calls to clarify details of their conversation, no contact with Beach was made after September 1993. Plaintiffs' complaint was filed on November 21, 1995, more than two

years after the absolutely last contact agents had with Defendants Beach and Hines.

95. For limitations purposes, the question becomes when Plaintiffs knew or should have known of the complained of acts. This question is answered by Mark Rasmusson himself. In his affidavit, Mr. Rasmusson states, in several places, that he was aware that Defendant Beach was furnishing false, misleading and slanderous information to Customs agents. Paragraph 23 of Mr. Rasmusson's affidavit reads:

> My employees and my business competitors were interviewed. One competitor, Gail Beech (sic), owner of Aero Freight, used these interviews to furnish false, misleading, and slanderous information about me and Rasmark to USCS and later to officials of Ford Motor Co., one of my major customers.

Mr. Rasmusson makes similar allegations in paragraphs 10, 27 and 39. The chronology of the paragraphs in his affidavit leads the court to conclude that Mark Rasmusson knew as early as 1989 that Gail Beach was making allegedly slanderous statements to Customs agents concerning Rasmark. If Plaintiffs seek to hold Beach and Hines liable for defamation, their claim is time barred.[207] If Plaintiffs seek to hold Beach and Hines liable for providing information to Customs agents in the course of an investigation, the two are immune from civil liability for their actions under 19 U.S.C. § 507(b). That section reads, in part:

> Any person other than an officer or employee of the United States who renders assistance in good faith upon the request of a customs officer shall not be held liable for any civil damages as a result of rendering such assistance if the assisting person acts as an

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FN 207. Suits for defamation must be brought within on year of the accrual of the cause of action. See TEX. CIV. PRAC. & REm. CODE § 16.002.

> ordinary, reasonably prudent person would have acted under the same or similar circumstances.

Both Defendants Beach and Hines have affied that they responded to the inquiries truthfully and provided information in good faith. Plaintiffs' uncorroborated allegations that Beach and Hines engaged in misinformation, without more, is certainly not enough to defeat Defendants' affirmations that they acted as ordinary, reasonably prudent individuals. Thus, notwithstanding the fact that Plaintiffs' claims against Beach and Hines fail on limitations grounds, Beach and Hines are likewise immune from civil liability under 19 U.S.C. § 507(b).

2) Aero Freight, Inc.

96. Plaintiffs have named Aero Freight, Inc. as a party Defendant to the suit, but have failed to allege any causes of action against it. Accordingly, Aero Freight, Inc. is dismissed from the case on grounds that no claims have been asserted against it.

G. Defendants Involved in the Financial Task Force (FTF)

1) Fonda Hivick

97. IRS Special Agent Fonda Hivick was, for a time, assigned to the IRS Criminal Investigation Division in El Paso. While there, Agent Hivick's job was to identify and investigate individuals suspected of violating tax laws. From April 1992 through February 1993, Agent Hivick was assigned to work with the Organized Crime Drug Enforcement Task Force (OCDETF) investigating money laundering between the United States and Mexico. A portion of the investigation focused on Mark Rasmusson and Rasmark Jet Charter. Agent Hivick participated in the investigation of Mr. Rasmusson and Rasmark in the following ways:

1) On May 27, 1992, Agent Hivick was present when Agent Frost opened the box of records obtained from Debra Rasmusson

pursuant to a search warrant. She prepared an inventory of items found in the box and gave it to Agent Frost.

2) On June 11, 1992, Agent Hivick made a cursory examination of the records but prepared no work papers.

3) On August 20, 1992, Agent Hivick conducted a brief surveillance of Rasmark Jet Charter.

4) On August 24, 1992 and August 26, 1992, Agent Hivick retrieved information from The Treasury Enforcement Communication System (TECS) concerning international flights made by Rasmark Jet Charter aircraft.

5) On December 8, 1992, Agent Hivick and Agent Seals interviewed Mr. Rasmusson at his office concerning a round trip charter flight to the Cayman Islands.

6) On June 8, 1993, Agent Hivick was present at the United States Attorney's Office in El Paso debriefing an individual pursuant to a proposed plea agreement.

7) On November 22, 1993, Agent Hivick was assigned to the search team during the execution of a search warrant at Rasmark Jet Charters. She was one of approximately three agents who searched Mark Rasmusson's office at Rasmark. Agent Hivick unequivocally denies ever stating to anyone in the course of the investigation that Rasmark was a front corporation for money laundering or that Mark Rasmusson was a known cocaine dealer.

98. As was earlier established, Plaintiffs have no constitutional right to be free from an investigation.[208] Plaintiffs certainly do have a constitutional right to be free from unreasonable searches and seizures, but they have failed to establish that the

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FN 208. *See, e.g., Cantu v. R ocha*, 77 F.3d 795, 808 (5th Cir. 1996).

execution of the November 22, 1993 search warrants constituted a violation of their Fourth Amendment rights.[209] Nor have the Plaintiffs proffered any evidence to refute the fact that Agent Hivick at all times acted as would a reasonable agent under the circumstances. As such, Agent Hivick is entitled to qualified immunity from suit on all claims against her. Mere conclusory allegations and bald assertions are insufficient to overcome Agent Hivick's qualified immunity. With respect to the execution of the search warrant, an officer will be immune from liability unless, "on an objective basis," it is obvious that no reasonably competent officer could have concluded that a warrant should issue.[210] All officers engaged in the execution of the two search warrants have affied that the warrant, on its face, appeared to be validly issued. Therefore, the court cannot conclude that no reasonably competent officer could have concluded that a warrant should issue. Plaintiffs' bald allegations that they were the victims of a conspiracy, of which Agent Hivick was a participant, likewise cannot overcome the immunity defense.[211] Thus, all claims against Agent Hivick are dismissed on grounds of qualified immunity.

2) Walter J. King

99. Agent King was a Special Agent with the Customs Service in El Paso from April 1987 to December 1, 1996. During that time, he was assigned to the Financial Investigations Group, which at times was called upon to provide support to the Financial Task Force. Agent King was intermittently assigned to the FTF to conduct surveillance at various locations during FTF's investigation of the Rasmussons and of Rasmark. On November 22, 1993, Agent King was

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FN 209. *See* Section H, *infra*

FN 210. *Streetman*, 918 F.2d at 556 (5th Cir. 1990) (quoting *Malley, 475 U.S. at 341, 106 S.Ct. at 1096).*

FN 211. *See Streetman*, 918 F.2d at 556; *Lynch v. Cannatella,* 810 F.2d 1363, 1370 (5th Cir. 1987) ("Bald allegations that a conspiracy existed are insufficient.").

assigned to assist the FTF in executing a search warrant at Rasmark's corporate offices. His job was to photograph the evidence seized. The camera malfunctioned, however, and Agent King spent his time guarding the evidence. He did not participate in the execution of the search warrant at the Rasmusson residence. Plaintiffs have not stated a constitutional violation against Agent King. In addition, as the court noted in discussing the charges against Agent Hivick, an officer is immune from liability arising from the execution of a search warrant unless, on an objective basis, it is obvious that no reasonably competent officer could have concluded that a warrant should issue.[212] Such was not the case here. Accordingly, the claims against Agent King are dismissed on grounds of qualified immunity.

3) Joe L. Acosta

100. FBI Special Agent Joe L. Acosta has been assigned to the El Paso Division of the FBI since January 1992. He was designated by the FBI as its representative on the Organized Crime Drug Enforcement Task Force (OCDETF) in July 1992. While on the Task Force, Agent Acosta's role in investigating the Rasmussons was minimal. He passed along information, verbatim, from an FBI informant to Task Force members. That information made its way into the affidavits supporting the applications for the two November 22, 1993 search warrants.

101. Agent Acosta, along with several other Task Force agents, was present at the Rasmark hanger on June 1, 1993, where the agents unsuccessfully sought to interview a Rasmark pilot. He was also present on June 22, 1993 in Plaintiff Gantkessy's office where several Task Force members interviewed Gantkessy concerning his possible involvement with Rasmark. During the execution of the November 22, 1993 search warrant, Agent Acosta's job was to videotape the search locations before and after the search. He did not seize any evidence during the search. Aside form alleging that Agent Acosta participated

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FN 212. *See Streetman*, 918 F.2d at 556.

in a conspiracy, Plaintiffs have failed to allege any violations of their constitutional rights attributable to Agent Acosta. Neither the interview of a Rasmark pilot at the tarmac, nor the interview of Gantkessy, nor the videotaping of the premises to be searched pursuant to a warrant is violative of Plaintiffs constitutional rights. As such, Agent Acosta is entitled to qualified immunity.

4) Eric E. Mills

102. Senior Special Agent Eric Mills has been with the Customs Service in El Paso since November 1991. In September 1992, he was assigned to coordinate and oversee a group of Special Agents conducting surveillance of Rasmark Jet Charters. Agent Mills was present on May 23, 1992 when Debra Rasmusson was interviewed. He was also present at the Ysleta Port of Entry on November 10, 1992 when Customs Inspectors seized Debra Rasmusson's vehicle. Agent Mills declared, under penalty of perjury, that he never fabricated any evidence, never took part in any sham investigation, never was part of any conspiracy, and never had any contact with bank officers or employees regarding Plaintiffs. Plaintiffs have failed to allege a violation of any constitutional rights against Agent Mills. There is certainly no constitutional right to be free from surveillance in the course of an ongoing investigation. And anything else Agent Mills did, he did in an objectively reasonable manner and is entitled to qualified immunity. Plaintiffs have not put forth any evidence to overcome Agent Mills's claim of qualified immunity. Separately, Plaintiffs have failed to allege any claims against Agent Mills within the requisite statute of limitations period. As such, Plaintiffs' claims against him are also barred by the statute of limitations.

5) Larry K. Brown

103. Customs Service Special Agent Larry K. Brown was assigned to a 45 day detail at the Customs Service office in El Paso from May 17, 1993 to June 30, 1993. While there, he was assigned to assist in an ongoing Organized Crime Drug Enforcement Task Force (OCDETF) investigation. He participated in surveillance

and one garbage pick up. He was also present at the interview of Gantkessy at Gantkessy's place of employment. Agent Brown affirmed, under penalty of perjury, that he had never participated in any conspiracy nor did anything illegal in the course of the investigation. Plaintiffs have failed to allege a violation of any of their constitutional rights against Agent Brown. Nor have the Plaintiffs brought forth any evidence to refute the fact that, at all times, Agent Brown acted as would an objectively reasonable agent. As such, Agent Brown is entitled to qualified immunity from suit.

6) Michael Wilezewski

104. Agent Wilczewski is currently a Group Supervisor with the Office of Investigations, United States Customs Service, in El Paso, Texas. He has held that position since 1989. In February 1992, Agent Wilczewski was reassigned to the position of Currency Group Supervisor, under which the Financial Task Force (FTF) was organized. Agent Wilczewski's supervision of the FTF consisted of attending regularly scheduled meetings and conferences; routinely reviewing all interim or significant incident reports; discussing with Senior Special Agent Frost all proposed law enforcement activities, and frequently being physically present to observe the activities of law enforcement officers in connection with the investigation. Agent Wilczewski was present on May 24, 1992 at the Customs Service offices where Debra Rasmusson was interviewed. He was also present during the execution of the November 22, 1993 search warrants at both the Rasmusson residence and Rasmark's corporate offices.

105. Insofar as Plaintiffs seek to hold Agent Wilczewki vicariously liable for the acts of his subordinates, their claims fail for reasons already discussed. All of the Agent's other actions are protected by qualified immunity. Once again, Plaintiffs' bald allegations are not enough to overcome the qualified immunity defense, especially when such embellishments are denied under penalty of perjury by Agents familiar with the specific facts.

7) Fred J. Schroeder

106. Senior Special Agent Fred J. Schroeder has been employed as an investigator with the United States Customs Service in El Paso since 1987. From January 1993 to February 1994, he was assigned to the FTF, under the direction of Agent Frost, in connection with the investigation of money laundering activities in the El Paso area. Agent Schroeder served as a team leader for the Rasmusson portion of the investigation. In the course of the investigation, Agent Schroeder wrote close to 100 reports covering such items as the retrieval of residence trash, surveillance of the Rasmusson residence and of Rasmark corporate offices, and interviews of various witnesses. On November 22, 1993, Agent Schroeder supervised the execution of the search warrant at the Rasmusson residence. He was also present at the interview of Plaintiff Gantkessy at his place of employment on June 2, 1993. Plaintiffs have failed to allege any constitutional violations against Agent Schroeder. As such, the Agent is entitled to qualified immunity for all of his actions. He is entitled to qualified immunity for the execution of the search warrant for the reasons given below. As to the claims asserted by Plaintiff Gantkessy, no claim arises to a level of a constitutional violation. Thus, all claims against Agent Schroeder will be dismissed on grounds of qualified immunity.

H. Lawrence Frost

107. The court finally comes to the one individual who was most involved in the FTF investigation of the Plaintiffs, Customs Service Special Agent Frost. While Plaintiffs allege that Agent Frost, along with the other Defendants, was the source of numerous ills, their real complaint against Agent Frost is his preparation and submission of the two affidavits on November 19, 1993 in support of the search warrants for Plaintiffs' residence and place of business. Plaintiffs seek to hold Agent Frost liable for submitting affidavits full of lies and misstatements. Having reviewed both affidavits, as well as the case law governing Plaintiffs' burden in challenging the validity of the affidavits, the court holds that Plaintiffs' claims against Agent Frost fail.

108. In order for Plaintiffs to sustain a successful *Bivens* claim against Agent Frost, they must first establish a violation of their constitutional rights. The violation complained on in this instance is the Fourth Amendment right to be free from unreasonable searches and seizures. In Section IX(B), the court noted that warrantless searches were considered *per se* unreasonable, absent probable cause or consent. In this case, both searches were supported by search warrants. Even when a search warrant has been issued, the search of an individual's home pursuant to that warrant violates the Fourth Amendment, nonetheless, if the warrant is invalid.[213] By invalid, the court refers to a warrant supported by an affidavit insufficient to establish probable cause. In the criminal context, where evidence is obtained in violation of a person's constitutional rights, that evidence is excludable at trial under the exclusionary rule. Under the good faith exception to the exclusionary rule, however, officers may rely on a warrant supported by affidavit alleging more than wholly conclusory statements even if the affidavit, subsequently assessed, is found insufficient to establish probable cause.[214] An affidavit "so lacking in evidence of probable cause as to render official belief in its existence entirely unreasonable" is known as a "bare bones" affidavit.[215] "Bare bones" affidavits contain wholly conclusory statements, which lack the facts and circumstances

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FN 213. *United States v. Parker*, 722 F.2d 179, 183 (5th Cir. 1983).

FN 214. *United States v. Leon*, 468 U.S. 897, 922-23, 104 S.Ct. 3405, 3420, 82 L.Ed.2d 677 (1984); *United States v. Benbrook*, 40 F.3d 88,91 (5th Cir. 1995); *United States v. McCarty*, 36 F.3d 1349, 1356 (5th Cir. 1994); *United States v. Fisher*, 22 F.3d 574, 578 (5th Cir.), *cert. denied*, 513 U.S. 1008,115 S.Ct. 529,130 L.Ed.2d 433 (1994); *United States v. Satterwhite*, 980 F.2d 317, 320 (5th Cir. 1992).

FN 215. *McCarty*, 36 F.3d at 1356; *Fisher*, 22 F.3d at 578; *Satterwhite*, 980 F.2d at 320; *United States v. Craig*, 861 F.2d 818, 821 (5th Cir. 1988).

from which a magistrate can independently determine probable cause.[216] When a warrant is supported by more than a "bare bones" affidavit, officers may rely in good faith on the warrant's validity in conducting a search.[217] And if an officer's reliance on a search warrant is objectively reasonable, evidence obtained under such a warrant is admissible, even if the warrant itself is not based on adequate probable cause.[218] In other words, a criminal defendant cannot seek to exclude incriminating evidence found pursuant to a search warrant under the Fourth Amendment if the executing officers' reliance on the search warrant is objectively reasonable and the warrant is supported by more than a "bare bones" affidavit.

109. Plaintiffs seek to hold individual officers liable civilly for executing the two search warrants on November 22, 1993. However, Plaintiffs have not established that the officers' actions violated their Fourth Amendment rights. All of the officers involved in the execution of the two November 22, 1993 search warrants relied in good faith on the validly issued warrants, and there is little question that the warrants were supported by more than "bare bones" affidavits. Both affidavits,

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FN 216. *See United States v. Marmolejo*, 89 F.3d I 1 85, 1199 (5th Cir. 1996); *United States v. White,* 72 F.3d 1200, 1213 (5th Cir. 1996); *United States v. Brown,* 941 F.2d 1300, 1303 n. 1 (5th Cir. 1991) *(per curiam)* (giving as an example, an affidavit that states the affiant "' has cause to suspect and does believe"' that contraband is located on the premises).

FN 217. *Marmolejo*, 89 F.3d at It 89 (5th Cir. 1996); *White,* 72 F.3d at 1213 (5th Cir. 1996); *Satterwhite,* 980 F.2d at 321; *United States v. Pigrum, 922 F.2d 249, 252 (5th Cir.), cert. denied,* 500 U.S. 936, 111 S.Ct. 2064,114 L.Ed.2d 468 (1991); *United States v. Settegast,* 755 F.2d 1117, 1122 n. 6 (5th Cir. 1985).

FN 218. *United States v. Broussard*, 80 F.3d 1025, 1034 (5th Cir. 1996); *United States v. Restrepo,* 994 F.2d 173, 187 (5th Cir. 1993); *United States v. Royal,* 972 F.2d 643, 646 (5th Cir. 1992), *cert. denied*, 507 U.S. 911, 113 S.Ct. 1258, 122 L.Ed.2d 655 (1993).

one seeking a warrant to search the Rasmusson residence and the other seeking a warrant to search Rasmark corporate offices, were extremely detailed. The affiant, Agent Frost, set forth in great detail the facts thus far established in the investigation and the reasons he thought the search warrants would help uncover further evidence of an ongoing criminal activity. An affidavit must establish a nexus between the place to be searched and the evidence sought,[219] and the affidavits submitted by Agent Frost did just that. All of the officers involved in the execution of the two search warrants were justified in relying on them. Plaintiffs have not proffered any evidence to show otherwise. An officer relying on a search warrant will be immune from liability unless, on an objective basis, it is obvious that no reasonably competent officer could have concluded that a warrant should issue.[220]

110. As concerns Agent Frost specifically, Plaintiffs seek to hold him liable under *Bivens* for obtaining the two search warrants on the basis of false affidavits. In the criminal context, a criminal defendant, against whom evidence seized pursuant to a search warrant is being introduced, can seek to suppress such evidence by challenging the validity of the underlying affidavit supporting the search warrant. In *Franks v. Delaware*,[221] the Supreme Court held that,

> where the Defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's

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FN 219. *United States v. Pace*, 955 F.2d 270, 276-77 (5th Cir. 1992).

FN 220. *Malley*, 475 U.S. at 341, 106 S.Ct. at 1096; *Streetman*, 918 F.2d at 556 (5th Cir. 1990).

FN 221. 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

> request. In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.[222]

The holding in *Franks* is consistent with the jurisprudence developed under the exclusionary rule. Under *Franks*, if the defendant can prove, by a preponderance of the evidence, that the affidavit supporting the warrant contains intentional material misrepresentations or omissions, and that without those omissions and misrepresentations the affidavit is no more than a "bare bones" affidavit (i.e., an affidavit that does not establish probable cause),[223] any evidence seized pursuant to that warrant is excludable at trial.[224] Negligent omissions will not undermine the affidavit.[225] Only if the defendant is able to show that the affiant made the statements with deliberate falsity or with reckless disregard for the truth will the court invalidate the warrant and exclude all evidence seized pursuant to it.[226]

111. A statement in a warrant affidavit is not false merely

FN 222. *Id.* at 155-56, 98 S.Ct. at 2676.

FN 223. *See United States v. Cherry*, 50 F.3d 338, 341 (5th Cir. 1995).

FN 224. *See United States v. Singer*, 970 F.2d 1414, 1416 (5th Cir. 1992); *United States v. Namer,* 680 F.2d 1088, 1093 (5th Cir. 1982).

FN 225. *McCarty*, 36 F.3d at 1356.

FN 226. *United States v. Ivy*, 973 F.2d II 84, 1187 (5th Cir. 1992); *United States v. Wake,* 948 F.2d 1422, 1428 (5th Cir. 1991).

because it characterizes or summarizes facts in a particular way; if a statement can be read as true, it is not a misrepresentation.[227] As noted *supra*, a search warrant is valid, even if the affidavit supporting it contains a misrepresentation, if after striking the misrepresentation, there remains sufficient content to support a finding of probable cause.[228] Probable cause is evaluated from the totality of the circumstances.[229]

112. Plaintiffs raise this *Franks* challenge in the civil context. They argue that Agent Frost intentionally misrepresented facts in the affidavits, or recklessly disregarded their truth, causing the affidavits to lack probable cause, thereby invalidating the warrant. There is no Fifth Circuit case law applying *Franks* in the civil context. The court, however, was cited to a fairly recent Tenth Circuit case, *Beard v. City of Northglenn, Colo.*,[230] which discusses a *Franks* challenge in the civil context, and finds its reasoning persuasive. *Beard* involved a § 1983 suit against two police officers for Fourth Amendment violations. Beard had answered an ad for pilots, and forwarded his flying credentials for review. The ad was part of a scam and Beard's flight credentials were never returned to him. The perpetrators of this scam extracted Beard's personal information from his credentials and used that information to effectuate a check kiting scheme.[231] Soon after their commission,

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FN 227. *Cherry*, 50 F.3d at 341; 970 F.2d at 1416; *United States v. Hare*, 772 F.2d 139, 141 (5th Cir. 1985).

FN 228. *United States v. Privette*, 947 F.2d 1259, 1261 (5th Cir. 1991), *cert. denied*, 503 U.S. 912, 112 S.Ct. 1279, 117 L.Ed.2d 505 (1992).

FN 229. *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983*)).*

FN 230. 24 F.3d 110 (10th Cir. 1994).

FN 231. The scheme involved the opening of two checking accounts, one in Plaintiff s name and one in the name of another person whose police officers began investigating these crimes. The investigation led police to Beard, because his name was used to open up one of the accounts. The investigating officers acquired a copy of Beard's driver's license from the state Department of Public Safety to verify his signature on the account application, and Beard was identified in a photo line-up as the perpetrator by one of the furniture store employees.[232] Based on that information, and other evidence collected in the course of their investigation, the officers prepared an affidavit in support of an arrest warrant. A judge considered the affidavit and issued the warrant for Beard's arrest; Beard was soonafter arrested.[233]

113. Five months later, after discovering his complete innocence, all charges against Beard were dropped. Beard subsequently filed suit against the investigating/arresting officers under § 1983, claiming violations of his Fourth Amendment rights. Among other things, Beard alleged that the affidavit prepared by the officers contained false and misleading information and material omissions. The district judge found that the officers had violated Beard's constitutional rights, but that they acted as would any reasonable officers under the circumstances and, as such, were entitled to qualified immunity.[234] The Tenth Circuit disagreed with the district court's analysis, but affirmed its judgment.

FN 231 (...continued)
flight credentials had also been stolen, at two different banks. The balances of these accounts would then be artificially inflated by writing and depositing checks from one to the other, and vice-versa. The criminals then used the temporarily artificially high balances in these accounts to purchase office furniture and a car. When the checks bounced, the perpetrators were nowhere to be found. *Id.* at 112.

FN 232. *Id.* at 113.

FN 233. *Id.*

FN 234. *Id.* at 114.

114. The *Beard* court first held that a potential Fourth Amendment violation resulting from the issuance of a warrant is to be analyzed at the time the warrant is issued, and not at a later point. The court held that Beard's Fourth Amendment rights were not violated simply because later events proved him innocent.[235] Applying this statement of law to the case at hand, the court must determine whether any alleged Fourth Amendment violations existed as of November 19, 1993. Plaintiffs submit a slew of affidavits, prepared in 1996 and 1997, from individuals interviewed by Agent Perkins in 1990 in the course of the Flores investigation, taking issue with various statements Agent Perkins attributed to them in his DEA-6 reports. Certain portions of those reports were used by Agent Frost in his November 19th affidavits. Because the affidavits submitted by Plaintiffs were prepared three to four years after Agent Frost had prepared his affidavits, they are irrelevant to the determination of whether Agent Frost's affidavits violated Plaintiffs' Fourth Amendment rights.

115. The *Beard* court then discussed the standard set forth in *Franks* governing challenges to affidavits: "To impeach an otherwise valid warrant on the ground that it was false and critical to the finding of probable cause requires proof that the affiant seeking the warrant knew that the challenged information was false or that he had a reckless disregard for its truth." [236] The *Beard* court applied this exact standard to its analysis of Beard's civil challenge to the warrant affidavit.

116. To that end, the Tenth Circuit held that a finding that the affiants had not intentionally misrepresented the truth, or recklessly disregarded it, also constitutes a finding that the defendant officers acted reasonably under the circumstances. Likewise, a finding of objective reasonableness on the part of the affiants constitutes a finding that the affiants did not intentionally misrepresent the truth or were

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FN 235. *Id.*

FN 236. *Id.*

reckless with respect to it.[237] In other words, a district court cannot make the split finding that a plaintiff's Fourteenth Amendment rights were violated on the one hand, yet the officers' conduct was objectively reasonable on the other, entitling them to qualified immunity. This court, likewise, does not see why a less stringent standard than the one developed in *Franks* should apply to a civil plaintiff seeking to hold an officer liable for Fourth Amendment violations on grounds of an invalid search warrant.

117. In the present case, Plaintiffs have not proffered any evidence to show that at the time Agent Frost prepared his affidavits he intentionally misrepresented or omitted material facts, or recklessly disregarded their truth or falsity. For Plaintiffs to demonstrate at least recklessness on Agent Frost's part there must exist evidence that the Agent "'in fact entertained serious doubts as to the truth of his' allegations ... and [a] factfinder may infer reckless disregard from circumstances evincing 'obvious reasons to doubt the veracity' of the allegations."[238] Other than pure speculation and conjecture, Plaintiffs presented no evidence that Agent Frost entertained serious doubts as to the truth of his allegations. Agent Frost had no reason to doubt the accuracy of Agent Perkins's DEA-6 reports. Moreover, Agent Frost did not use the information from the reports as gospel truth. In his affidavits, any time Agent Frost referred to information contained in the DEA-6s, he stated "it was reported that ......" Thus, for the most part, Agent Frost simply relayed what was reported in the DEA-6 reports.

118. This court will not impose a burden on law enforcement officers to personally verify each fact they present in an affidavit. If that were the law, then no law enforcement investigation could be conducted by a team, since one affiant could not have first hand knowledge of

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FN 237. *Id.* at 116.

FN 238. *Id.* (citing *United States v. Williams,* 737 F.2d 594, 602 (7th Cir. 1984) *(quoting St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968)), *cert. denied,* 470 U.S. 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985)).

every aspect presented in the affidavit unless he or she was personally present at every interview, every surveillance, every record search, etc.. This would certainly defeat the purpose of allocating various aspects of the investigation to those officers best skilled to handle them, and to then collect the findings under one umbrella and move forward. Clearly, that is not the law. Agent Frost affied that he had no reason to doubt the veracity of Agent Perkins or the truthfulness of his reports. Nor did Agent Frost have any reason to doubt the truth or veracity of any other law enforcement officer providing information, whether from surveillance or trash pick-ups or interviews. The fact that Plaintiffs submit affidavits from individuals interviewed by Agent Perkins, who take issue with some of the statements attributed to them in his reports, six to seven years after the fact, and three to four years after Agent Frost prepared his affidavits, does nothing to alter the court's finding that Agent Frost did not intentionally misrepresent any material facts or was reckless with regard to their truth or falsity. Accordingly, the court finds that Plaintiffs have failed to state a claim under the Fourth Amendment based on the preparation of the November 19, 1993 affidavits or the execution of the November 22, 1993 search warrants. As such, all claims against Agent Frost will be dismissed on grounds of qualified immunity.

X. CONCLUSION

119. To summarize, the court finds:

1) Rasmark is not entitled to maintain an action under either *Bivens* or § 1983.

2) Plaintiffs have failed to state a claim under the First Amendment.

3) Plaintiffs have failed to state a claim under the Fourth Amendment.

4) Plaintiffs have failed to state a claim under the Fifth

Amendment.

5) Plaintiffs have failed to state a claim under the Fourteenth Amendment.

6) Any claims by Gantkessy arising out of the July 26, 1993 letter to Ford Motor Company lie in tort.

7) Any and all tort claims asserted against individual federal defendants are treated as tort claims against the federal government under the Federal Tort Claims Act.

8) All law enforcement defendants were acting within the course and scope of their employment.

9) The following claims asserted against the federal government are not actionable under the FTCA: defamation and interference with contractual and employment relations.

10) Plaintiffs' abuse of process claim is not actionable under the FTCA because they failed to meet the jurisdictional prerequisites.

11) Plaintiffs have failed to state a claim against Aero Freight, Inc..

12) The El Paso Police Department and the El Paso Sheriffs Department are not proper parties to this law suit.

13) Chief of Police Russ Leach and Sheriff Leo Samaniego, both sued in their official capacity only, are dismissed from suit as superfluous.

14) Plaintiffs have failed to state a claim against either the City or County of El Paso under § 1983.

15) Plaintiffs' claims against Defendant Beach and Hines are untimely. Alternatively, Plaintiffs' claims against Defendants Beach and Hines are barred by 19 U.S.C. § 507(b).

16) All individual defendants, other than Beach and Hines, are entitled to qualified immunity.

17) Plaintiffs claims against many of the Defendants were untimely brought.

Accordingly,

120. It is ORDERED that the Motion for Summary Judgment by Defendant Gail Beach, Chris Hines, and Aero Freight, Inc. be GRANTED.

121. It is ORDERED that the Second Supplemental Motion for Summary Judgment by Defendant Leo Samaniego, Neil Baker, Jerry Keith, County of El Paso and El Paso County Sheriff s Department be GRANTED.

122. It is ORDERED that the Motion for Summary Judgment by Defendant City of El Paso, Russ Leach and El Paso Police Department be GRANTED.

123. It is ORDERED that the Motion to Dismiss or, in the Alternative, Motion for Summary Judgment by the Federal Defendants'[239] be GRANTED.

124. It is ORDERED that the Motion for Summary Judgment by Defendant Neil Baker and Jerry Keith be GRANTED.

Signed this 22nd day of May, 1997.

/s/ Royal Furgeson
UNITED STATES DISTRICT JUDGE

FN 239. The Federal Defendants are: Wilczewski, Frost, Schroeder, HalleM Weise, Hensley, King, Reay, Lappe, Mills, Brown, Perkins, Chavez, Aguirre, Lenox, Hivick, Martinez, and Acosta.

[Paragraph numbers added to text.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Mark B. Rasmusson, et al. §
§
Plaintiffs §
§
v. § **EP-95-CA-475**
§ May 22, 1997
Lawrence E. Frost, et al. §
§

ORDER

1. On the 22nd day of May, 1997, the Court entered a Memorandum Opinion and Order granting Defendants' Motions for Summary Judgment. That same day, the court entered a Final Judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure. In light of the Memorandum and Order, the court now enters the following:

2. It is ORDERED that Plaintiffs' Motion to Seal, filed on March 14, 1997, be DENIED.

3. It is ORDERED that Defendant Leo Samaniego's, Neil Barker's, Jerry Keith's, County of El Paso's and el Paso county Sheriff's Department's Motion for Leave to File Pleadings in excess of Ten Pages, filed on March 31, 1997, be GRANTED.

4. It is ORDERED that Defendant City of El Paso, El Paso Police Department and Russ Leach's Motion for Leave to File Amended Answer and Amended Motion for Summary Judgment, filed on March 31, 1997, be GRANTED.

5. It is ORDERED that Defendant George Salas and James Holland's Motion for Leave to File Pleadings in excess of Ten Pages, filed on March 31, 1997, be GRANTED.

6. It is ORDERED that the Federal Defendants' Motion for Leave to File in Excess of Ten Pages, filed on April 2, 1997, be GRANTED.

7. It is ORDERED that the Federal Defendants' Motion for Leave to File Declarations of Larry Brown and Donald Reay, filed on April 13, 1997, be GRANTED.

8. It is ORDERED that Plaintiffs' Motion for Leave to File Pleadings in Excess of 10 Pages, filed on April 14, 1997, be GRANTED.

9. It is ORDERED that Plaintiffs' Motion to Extend Time to File Plaintiffs' Oppositions to Defendants' Motions for Summary Judgment, filed on April 14, 1997, be GRANTED.

10. It is ORDERED that Plaintiffs' Motion for Leave to File Pleadings in Excess of 10 Pages, filed on April 15, 1997, be GRANTED.

11. It is ORDERED that Plaintiffs' Motion to Extend Time to File Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed on April 16, 1997, be GRANTED.

12. It is ORDERED that Plaintiffs' Motion to Strike Defendant Beach's, Hines's and Aero Freight's Motion for Summary Judgment, filed on April 16, 1997, be DENIED.

13. It is ORDERED that Plaintiffs' Motion for Discovery, filed on April 17, 1997, be DENIED.

14. It is ORDERED that Plaintiffs' Motion for Leave to File Cross Index of Constitutional Violations in Plaintiffs' Third Amended Complaint, filed on April 21, be GRANTED.

15. It is ORDERED that Plaintiffs' Motion for a *Franks* Hearing, filed on May 6, 1997, be DENIED.

16. It is ORDERED that Plaintiffs' Motion for Leave to File Plaintiffs' Renewed Motion to Strike Portions of the Affidavit of James Holland, filed on May 6, 1997, be DENIED.

17. It is ORDERED that Plaintiffs' Motion for Leave to File Plaintiffs' Renewed Motion to Strike Portions of the Affidavit of Leo Samaniego, filed on May 6, 1997, be DENIED.

18. It is ORDERED that Plaintiffs' Motion for Leave to File Plaintiffs' Renewed Motion to Strike Portions of the affidavit of Neil Baker, filed on May 6, 1997, be DENIED.

19. It is ORDERED that Plaintiffs' Motion for Leave to File Plaintiffs' Renewed Motion to Strike Portions of the Affidavit of Jerry Keith, filed on May 6, 1997, be DENIED.

20. It is ORDERED that Plaintiffs' Motion for Leave to File Plaintiffs' Renewed Motion to Strike Portions of the Affidavit of George Salas, filed on May 7, 1997, be DENIED.

21. It is ORDERED that the Motion to Strike filed by Defendant Salas on May 8, 1997, be DENIED AS MOOT.

22. It is ORDERED that the Motion to Strike Pleadings filed by Defendant Keith on May 12, 1997, be DENIED AS MOOT.

23. It is ORDERED that Plaintiffs' Motion for Leave to File Opposition to Federal Defendants' Notice of Substitution and Application for Order Thereon, filed on May 16, 1997, be DENIED.

24. It is ORDERED that Plaintiffs' Motion for Leave to File Motion to Stay Proceedings Until Such Time as Chief Judge Hudspeth Has Reviewed Plaintiffs' Motion to Strike Evidence, or to Transfer the Matter as a Connected Case to Chief Judge Hudspeth, filed on May 16, 1997, be DENIED.

25. It is ORDERED that Plaintiffs' Motion for Leave to File Plaintiffs' Motion to Compel Production of all Records, filed on May 16, 1997, be DENIED.

26. It is ORDERED that Plaintiffs' Motion for Leave to File Plaintiffs' Opposition to Federal Defendants' Reply filed on May 6, 1997 exceeding page limit, filed on May 16, 1997, be DENIED.

27. It is ORDERED that all pending Motions not specifically disposed of be DENIED AS MOOT.

Signed this 22nd day of May, 1997.

/s/ Royal Furgeson
UNITED STATES DISTRICT JUDGE

[Paragraph numbers added to text]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

MARK A. RASMUSSON, et al., §
§
Plaintiffs, §
v. § EP-95-CA-475-F
LAWRENCE E. FROST, et al., § August 9, 1996
§
Defendants. §

SCHEDULING ORDER

1. On this day, the Court has considered the pending motions in the above styled and numbered case and the various discovery disputes that have arisen thus far. The Court held a status conference on August 8, 1996, to determine the parties to the suit and their respective arguments, to resolve discovery issues, and to set parameters for the completion of discovery, particularly as to the Defendants' Motion for Qualified Immunity. As a result of that hearing the Court enters the following Order.

2. It is hereby ORDERED that Plaintiffs will provide the Court with a list of no more than 12 individuals whom they wish to depose as to the issue of Defendants, qualified immunity defense by August 15, 1996. Defendants will make any objections they have to this list by August 21, 1996. The Court will rule on any objections made by the Defendants on August 29, 1996.

3. The subject of these depositions will be limited specifically to the named Defendants, ability to assert a defense of qualified immunity. Plaintiffs, taking of these depositions will not exceed 2 hours in length. The Court will rule on any objections arising in the course of these 12 depositions by phone if necessary.

4. Depositions will be taken on Fridays beginning September 6, 1996, unless otherwise arranged by the parties. All depositions will take place in El Paso, TX. Any individuals whom Plaintiffs wish to depose who are located outside the El Paso metropolitan area will be brought to El Paso for the deposition at the Plaintiffs' expense or be deposed by telephone. In particular, it is the Court's understanding that Defendant Michael Lappe is in Holland at this time. His deposition will be done by phone if Plaintiffs intend to depose him. All depositions will be completed by September 27, 1996.

5. It is further ORDERED that Plaintiffs will also submit to the Court a list of its requests for document production by August 15, 1996. The requests for document production will be limited specifically to the named Defendants' ability to assert a defense of qualified immunity. As with the deposition requests, Defendants will file any objections to this list by August 21, 1996 and the Court will rule on any objections made by the Defendants on August 29, 1996.

6. Plaintiffs are to file their Third Amended Complaint by October 18, 1996. Defendants will have until November 1, 1996, to file their Amended Motions for Summary Judgment on the issue of qualified immunity. Plaintiffs will have until November 15, 1996, to file responses as to Defendants' summary judgment motions on qualified immunity.

7. It is further ORDERED that all other discovery in this matter beyond the resolution of the qualified immunity issue as outlined above is stayed until further notice from the Court. No other interrogatories are to be served or answered until such time as Plaintiffs file their third amended complaint.

8. Oral arguments regarding the summary judgment motions will be held Tuesday, November 19, 1996 , at 2:00 p.m.

SIGNED this 9th day of August, 1996.

/s/ ROYAL FURGESON
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

MARK B. RASMUSSON, RASMARK §
JET CHARTER, INC., DEBORAH §
L. RASMUSSON, ANDREW A. § NO. EP-95-CA-475-F
GANTKESSY §
§ August 30, 1996
v. §
§
LAWRENCE E. FROST, ET AL. §

ORDER REGARDING PLAINTIFFS' PRODUCTION REQUEST FOR QUALIFIED IMMUNITY

On this day, the court considered Plaintiffs, Production Request for Qualified Immunity and the responses thereto. At the outset, the court must observe that the Requests did not comply in many respects with the spirit of the court's instructions at the last hearing on this matter. The court instructed counsel for Plaintiffs to focus the production request (and the entire case) to bring some coherence to the litigation. The 92 requests covering 18 pages were not focused. Plaintiffs took a "kitchen sink" approach to their requests, which complicate the court's efforts to better understand the limits of the qualified immunity issues and the entire case. Nonetheless, the court has reviewed the Request and the responses and believes the following order is appropriate.

It is accordingly ORDERED that:

1. Requests 1-9 are denied.

2. Request 10 is denied, because it is an interrogatory, not a document request.

3. Request 11 is granted for the year 1992.

4. Requests 12-18 are denied.

5. Request 19 is granted but only to the extent that the material is in handbook form, of public record and not deemed classified by statute, rule or regulation.

6. Requests 20-21 are denied.

7. Request 22 is denied because no responsive documents exist.

8. Request 23 is denied, because it is an interrogatory, not a document request.

9. Request 24 is denied.

10. Request 25 is granted.

11. Request 26 is granted with redaction approved, if necessary.

12. Requests 27-28 are granted.

13. Requests 29-30 are denied.

14. Request 31 is denied because there is only one document, the letter to Ford Motor Co., and it is already in the possession of Plaintiffs.

15. Request 32 is denied.

16. There is no Request 33.

17. Requests 34-35 are denied.

18. Request 36 is granted with redaction approved, if necessary.

19. Request 37 is denied because no responsive documents exist.

20. Requests 38-44 are granted with redaction approved, if necessary.

21. Request 45 is granted.

22. Request 46 is denied because no responsive documents exist.

23. Requests 4.7-48 are granted with redaction approved, if necessary.

24. Request 49 is granted.

25. Request 50 is denied because no responsive documents exist.

26. Request 51 is granted with redaction approved, if necessary.

27. Request 52 is denied' because no responsive documents exist.

28. Request 53 is denied because the documents are already in the possession of Plaintiffs.

29. Request 54 is denied.

30. Request 55 is denied because no responsive documents exist.

31. Request 56 is granted.

32. Requests 57-69 are denied.

33. Request 70 is granted.

34. Requests 71-73 are denied.

35. Request 74 is granted.

36. Requests 75-93 are denied.

In regard to the Requests which have been granted, the parties involved will coordinate the production to occur at a reasonable time in a place designated by the Defendant making the production.

SIGNED the 30th day of August, 1996.

/s/ ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

[Paragraph numbers added to text.]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS EL PASO DIVISION

Mark B. Rasmusson, et al.	§	
	§	
Plaintiffs	§	
v.	§	EP-95-CA-475-F
	§	
Lawrence E. Frost, et al.,	§	March 13, 1997
	§	
Defendants	§	

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR LEAVE TO ADD ADDITIONAL PARTIES TO THEIR THIRD AMENDED COMPLAINT

1. On this day the court considered Plaintiffs' Motion for Leave to Add Additional Parties to their Third Amended Complaint. The court is of the opinion that the Motion should be granted as to Defendant Agent Eric Mills, and denied as to Defendants United States Customs Service and Agent John Peterson.

2. In FDIC v. *Conner, 20* F.3d 1376 (5th Cir. 1994), the Fifth Circuit summarized the law governing the amendment of pleadings. In part, the court wrote that

> Federal Rule of Civil Procedure 15(a) evinces a strong bias in favor of granting a motion for leave to amend a pleading. The Rule's language that leave to amend "shall be freely given when justice so requires" is often cited. However, leave to amend need not be granted when it would be futile to do so. Such a situation arises

> when leave is sought to add a claim upon which the statute of limitations has run. However, under Rule 15(c), an amendment to a complaint will relate back to the date of the original complaint if the claim asserted in the amended pleading arises "out of the conduct transaction, or occurrence set forth or attempted to bee set forth in the original pleading." If a claim asserted in an amended pleading relates back to the date of the original complaint and is thus not barred by limitations, then leave to amend should ordinarily be granted.

Id. at 1385 (internal citations omitted). The court went on to discuss the application of the relation back doctrine under Rule 15(c).

> Some applications of the relation back doctrine are straightforward. If a plaintiff attempts to interject entirely different conduct or different transactions or occurrences into a case, then relation back is not allowed.... Conversely, if a plaintiff seeks to correct a technical difficulty, state a new legal theory of relief, or amplify the facts alleged in their prior complaint, then relation back is allowed.

Id. at 1386. Plaintiffs first seek to add the Customs Service to their third amended complaint, alleging that the agency violated the Privacy Act, 5 U.S.C. § 552a et seq.. In support of their Motion for Leave to Amend, Plaintiffs argue that because the Customs Service received a copy of the original complaint, it was put on notice that several of its agents had violated provisions of the Privacy Act. Plaintiffs are mistaken in their assertion. Not only was the Customs Service not named in the original complaint, but it could not have had notice that any of its agents had violated the Privacy Act, because a cause of action under the Act cannot be maintained against an individual, but only against an agency. *See* 5 U.S.C. § 552a(g)(1) (section governing civil remedies). The statute of limitations for civil enforcement of the Privacy Act is two years from the date on which the cause of action arose. *See* 5 U.S.C. § 552(g)(5). Thus, Plaintiffs' action against the Customs Service is barred by the statute of limitations. The relation back doctrine under Rule 15(c) is inapplicable to the case at hand because Plaintiffs seek to interject an entirely different transaction or occurrence into the case, and not simply to correct a technical difficulty, state a new legal theory of relief, or amplify the facts alleged in a prior complaint. *See Conner,* 20 F.3d at 1385-86. The same analysis applies to Agent John Peterson. He was not a named Defendant in the original complaint, was never served with a copy of the complaint, and the actions Plaintiffs complain of took place in 1988 and 1989, clearly outside the limitations period.

3. Finally, the court considers the addition of Agent Eric Mills as a party Defendant. Agent Mills was initially named as a Defendant in Plaintiffs' original complaint, but was later dropped due to insufficient facts. Plaintiffs now seek to add the Agent once again based on testimony given during a deposition held in January 1997. According to Plaintiffs, Agent Mills admitted to being intricately involved in surveillance and search and seizure operations directed against them. The Assistant United States Attorney, responding on behalf of Agent Mills in opposition to the Motion for Leave to Amend, argues that the Agent's deposition testimony clearly shows his minimal involvement. A particular excerpt from that video deposition was provided for the court's review. Although the excerpt would support the Agent's minimal involvement, because the court does not have the entire transcript before it, and because the Plaintiffs have reasserted, or amplified, facts previously alleged against the Agent, the court finds that the relation back doctrine under Rule 15(c) is applicable as to Agent Mills. This determination should in no way be read as a ruling on the merits concerning Agent Mills' liability. However, under the notice pleading regime, Plaintiffs have alleged sufficient facts, of a like enough nature as those alleged previously, so as to give the court little choice but to allow the addition of Agent Mills, and only Agent Mills, as a party Defendant. Accordingly,

5. It is ORDERED that Plaintiffs be GRANTED leave to add Agent Eric Mills as a party Defendant to their third amended complaint.

6. It is ORDERED that Plaintiffs be DENIED leave to add the United States Customs Service and Agent John Peterson as party

Defendants to their third amended complaint.

Signed this 13th day of March 1997.

/s/ ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

MARK B. RASMUSSON,	§	
RASMARK JET CHARTER, INC.,	§	
DEBORAH L. RASMUSSON,	§	
ANDREW A. GANTKESSY	§	
	§	
Plaintiffs,	§	
v.	§	NO. EP-95-CA-475-F
	§	
	§	August 30, 1996
LAWRENCE E. FROST, ET AL.	§	
	§	
Defendants.		

ORDER

On this day, the court considered Defendant United States' Notice of Substitution and Application for Order Thereon and the Court, having considered the same, is of the opinion that said application should be denied without prejudice to be refiled. The court's goal at this time is to focus on the qualified immunity issue. When that matter is ripe for decision, this matter may be ripe as well and ready for consideration. The Notice and Application for Order can then be refiled at that time.

It is therefore ORDERED that Defendant's Notice and Application be denied with prejudice to be refiled, for the reasons stated.

SIGNED this 30th day of August, 1996.

/s/ Royal Furgeson
UNITED STATES DISTRICT JUDGE

[Paragraph numbers added to text.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Mark B. Rasmusson, et al.,	§	
	§	
Plaintiffs	§	
	§	EP-95-CA-475
v.	§	
Lawrence E. Frost, et al.,	§	April 1, 1997
	§	
Defendants	§	

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S ORDER DENYING PLAINTIFFS' MOTION TO ADD U.S. CUSTOMS SERVICE AS PARTY-DEFENDANT IN PLAINTIFFS' THIRD AMENDED COMPLAINT

1. Currently pending before the court is Plaintiffs' Motion for Reconsideration of the Court's Order Denying Plaintiffs' Motion to Add U.S. Customs Service as Party-Defendant in Plaintiffs' Third Amended Complaint. On March 13, 1997, the court entered an Order granting Plaintiffs leave to add one additional party to their Third Amended Complaint. In that same Order, the court denied Plaintiffs leave to add the United States Customs Service and one Customs Agent to their Third Amended Complaint. Plaintiffs have now filed a Motion for Reconsideration, urging the court to revisit its March 13th Order. The Customs Service has filed a strenuous objection.

2. Plaintiffs seek to add the Customs Service to their third amended complaint, alleging that the agency violated the Privacy Act, 5 U.S.C. § 552a et seq.. In support of their Motion for Leave to

Amend, Plaintiffs argued that because the Customs Service received a copy of the original complaint, it was put on notice that several of its agents had violated provisions of the Privacy Act. The court disagreed. It held that not only was the Customs Service not named in the original complaint, but it could not have had notice that any of its agents had violated the Privacy Act, because a cause of action under the Privacy Act cannot be maintained against an individual, but only against an agency. *See* 5 U.S.C. § 552a(g)(1) (section governing civil remedies).

3. The statute of limitations for civil enforcement of the Privacy Act is two years from the date on which the cause of action arose. *See* 5 U.S.C. § 552a(g)(5). The court found that since the complained of acts on the part of the Customs Service occurred more than two years prior to the filing of the Third Amended Complaint, the statute of limitations had run. The court also found that the relation back doctrine under Rule 15(c) of the Federal Rules of Civil Procedure was inapplicable to the case at hand because Plaintiffs sought to interject a different transaction or occurrence into the case, and not simply to correct a technical difficulty, state a new legal theory of relief, or amplify the facts alleged in a prior complaint. *See F.D.I.C. v. Conner,* 20 F.3d 1376, 13 85-86 (5th Cir. 1996).

4. Section 552a(g)(5) also provides that "where an agency has materially and willfully misrepresented any information . . . and the information so misrepresented is material to establishment of liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation." In their Motion for Reconsideration, Plaintiffs contend that they discovered the material and willful misrepresentation on the part of the Customs Service around April 27, 1996, the day Plaintiff Gantkessy's file was received from his previous attorney, Mr. Antonio Silva. Plaintiffs contend that in that file, for the first time, they discovered a letter written by Customs Service Special Agent Michael T. Lappe to Ford Motor Company on July 26, 1993. The letter informed Ford Motor Company that one of its contract carriers, Rasmark Jet Charter, Inc., was under investigation for violations of numerous federal statutes

and that one of Ford's employees, Mr. Gantkessy, was possibly associated with Rasmark. Ford was asked to turn over any internal records concerning its association with Rasmark.

5. Plaintiffs contend that the contents of that letter are willful and malicious, and that the Customs Service should never have disclosed information concerning a pending investigation, which ultimately caused Rasmark to lose its contract with Ford. Plaintiffs also contend that details of the investigation were likewise maliciously and willfully disclosed to other third parties. The question that this court must resolve is not whether agents of the Customs Service acted maliciously in disclosing information about a pending investigation, but rather, assuming that their actions were willful and malicious, when the Plaintiffs knew about them. Having reviewed Plaintiffs' Original Petition (sic), the court once again finds that the statute of limitations for bringing a Privacy Act action against the Customs Service has run.

6. In their Motion for Reconsideration, Plaintiffs complain that one of the willful acts on the part of Defendant Frost was his contacting Plaintiff Rasmusson's former wife and telling her falsehoods about her former husband. However, in paragraphs 67 and 68 of their Original Petition (sic), Plaintiffs clearly show that they not only knew about these acts, but knew exactly when the allegedly willful acts occurred. Plaintiffs also knew about all of the contacts Customs agents had with Ford Motor Company, and the contents of those contacts. *See* Paragraphs 103, 105, 106 and 107. All of the contacts with Ford, including the raids, took place at the end of 1993, several months after Agent Lappe wrote Ford the letter. Several other "recently discovered" allegations were clearly stated by Plaintiffs in their Original Petition (sic). Normally, factual assertions in pleadings are considered to be judicial admissions conclusively binding on the party who made them. *See White v. ArcolPolymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir. 1983) (citing *Myers v. Manchester Ins. & Indemnity Co.*, 572 F.2d 134 (5th Cir. 1978)). Where amendments to pleadings only add allegations, deleting nothing stated in the prior pleadings, admissions made in the prior pleadings continue to have conclusive effect. Id. at 1396 n. 5 (*citing Dussouy v. Gulf Coast Inv.*

Corp., 660 F.2d 594, 601 (5th Cir. 198 1)). Plaintiffs have alleged acts in their Motion for Reconsideration which they alleged in their Original Petition (sic). According to the Original Petition (sic), Plaintiffs clearly knew of the alleged "misrepresentations" more than two years prior to the filing of the Third Amended Complaint. As such, Plaintiffs have failed to timely bring suit under the Privacy Act against the Customs Service. See 5 U.S.C. § 552a(g)(5). Accordingly,

7. It is ORDERED that Plaintiffs' Motion for Reconsideration of the Court's Order Denying Plaintiffs' Motion to Add U.S. Customs Service as Party-Defendant in Plaintiffs' Third Amended Complaint be DENIED.

Signed this 1st day of April, 1997.

/s/ ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

[Paragraph numbers added to text.]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS EL PASO DIVISION

Mark B. Rasmusson, et al., §
§
Plaintiffs §
v. § EP-95-CA-475-F
§
Lawrence E. Frost, et al., § June 12, 1997
§
Defendants §

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION AND/OR CLARIFICATION OF THE COURT'S ORDER OF MAY 27,1997 REGARDING PLAINTIFFS' OPPOSITION TO FEDERAL DEFENDANTS' NOTICE OF SUBSTITUTION AND APPLICATION FOR ORDER THEREON

1. Currently pending before the court is Plaintiffs' Motion for Reconsideration and/or Clarification of the Court's Order of May 27, 1997 Regarding Plaintiffs' Opposition to Federal Defendants' Notice of Substitution and Application for Order Thereon. Having considered the Motion, the court is of the opinion that it should be denied.

2. On May 27, 1997, the court entered an extensive Order disposing of all of Plaintiffs' claims. In its Order, the court found that certain of Plaintiffs' claims were actionable only under the Federal Tort Claims Act, and that those actions could have been brought only against the United States, and not against the named

individuals. At some point prior to the entry of the court's Order, the federal government moved to substitute the United States for the individual Defendants and to certify that all of the federal Defendants were acting within the scope of their employment. In its Order, the court expressly found that Fifth Circuit jurisprudence counseled against giving any weight to the certification by the Attorney General that federal agents were acting within the scope of their employment. In fact, in its Order, the court makes no mention of the certification, since it did not influence the court's decision. Plaintiffs now ask the court to reconsider its decision under the FTCA and have requested a hearing. The court declines Plaintiffs' invitation to reconsider its decision under the FTCA and will not hold a hearing on the matter. If Plaintiffs are entitled to relief, it will have to come from the Fifth Circuit. Accordingly,

3. It is ORDERED that Plaintiffs' Motion for Reconsideration and/or Clarification of the Court's Order of May 27, 1997 Regarding Plaintiffs' Opposition to Federal Defendants' Notice of Substitution and Application for Order Thereon be DENIED.

Signed this 12th day of June, 1997.

/s/ Royal Furgeson
UNITED STATES DISTRICT JUDTGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Mark B. Rasmusson, et al.,	§	
	§	
Plaintiffs,	§	
v.	§	
	§	EP-95-CA-475-F
Lawrence E. Frost, et al.,	§	
	§	June 12, 1997
Defendants.	§	

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION AND/OR CLARIFICATION OF THE COURT'S ORDER OF MAY 27,1997 REGARDING PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF ALL RECORDS THAT ARE DEFENDANTS' BASIS OF GOOD FAITH BEFORE THE COURT AND BASIS FOR OBJECTIONS TO DEPOSITION QUESTIONS OR ALTERNATIVE PRODUCE FOR IN CAMERA REVIEW

Currently pending before the court is Plaintiffs' Motion for Reconsideration and/or Clarification of the Court's Order of May 27, 1997 regarding Plaintiffs' Motion to Compel Production of All Records that are Defendants' Basis of Good Faith Before the Court and Basis for Objections to Deposition Questions or Alternative Produce for In Camera Inspection. Having considered the Motion, the court is of the opinion that it should be denied.

Contrary to well established Supreme Court and Fifth Circuit precedent, Plaintiffs were allowed to engage in extensive discovery on matters unrelated to the qualified immunity of the individual Defendants. As the court noted in its Order of May 27th, this extensive discovery failed to yield the desired results for Plaintiffs. Yet even after the court has determined that all individual Defendants working for various government entities were entitled to qualified immunity, Plaintiffs have continued to seek information unrelated to the qualified immunity issue. The court stands firm by its decision and will not compel the production of documents requested by Plaintiffs. If the court is in error, it will be told so by the Fifth Circuit. In the meantime,

It is ORDERED that Plaintiffs' Motion for Reconsideration and/or Clarification of the Court's Order of May 27, 1997 regarding Plaintiffs' Motion to Compel Production of All Records that are Defendants' Basis of Good Faith Before the Court and Basis for Objections to Deposition Questions or Alternative Produce for In Camera Inspection be DENIED.

Signed this 12th day of June, 1997.

/s/ Royal Furgeson
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS EL PASO DIVISION OF TEXAS

Mark B. Rasmusson, et al.,	§	
	§	
Plaintiffs	§	
	§	EP-95-CA-475 F
v.	§	
	§	June 20, 1997
Lawrence E. Frost, et al.,	§	
	§	
Defendants	§	

ORDER DENYING PLAINTIFFS' MOTION FOR NEW TRIAL

1. Currently pending before the court is Plaintiffs' Motion for New Trial, filed pursuant to Rule 59 of the Federal Rules of Civil Procedure. Since there was no trial in the case at hand, the court treats Plaintiffs' Motion as a Motion to Alter or Amend Judgment under Rule 59(b). On May 27, 1997, the court entered a detailed Order disposing of all of Plaintiffs' claims. Plaintiffs now take issue with many, if not most, of the court's conclusions. Having carefully read Plaintiffs' Motion for New Trial and Brief, the court finds that Plaintiffs have not raised any points that would make the court reconsider its previous opinion.

2. Prior to the hearing on the various pending motions, the court spent a great deal of time reading through the voluminous filings, especially through Plaintiffs' multi-volume exhibits. The primary purpose of the hearing was to give Plaintiffs an opportunity to provide the court with something other than conclusory allegations or inapposite affidavits on the issues of qualified immunity and the running of the statute of limitations. Despite being given every opportunity to show where fact issues existed in this case, the Plaintiffs failed to do so. The court was of the opinion at the time it wrote its Order, and remains of the same opinion after reading Plaintiffs' latest Motion, that Plaintiffs

have not only stated meritless claims, but they have failed to raise any issues of material fact on the questions of qualified immunity, municipal liability or the running of the statute of limitations. It is clear from all of their subsequent filings that Plaintiffs do not, in any way, agree with the court's Order. Although they will not be granted relief here, Plaintiffs do have a remedy: an appeal to the Fifth Circuit Court of Appeals. If this court has indeed applied the wrong legal standard in ruling on the various motions, or has transgressed in some other way, it will be told so by the Court of Appeals. So as not to mince words, if Plaintiffs are entitled to relief, it will not be forthcoming from this court unless it is told otherwise by the Fifth Circuit. Accordingly,

It is ORDERED that Plaintiffs Motion for New Trial, which was treated by this court as a Motion to Alter or Amend Judgment, be DENIED.

Signed this 20th day of June, 1997.

/s/ Royal Furgerson
UNITED STATES DISTRICT JUDGE

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

JAN 16 1996

95-0273:CLM:EP:C:DL

CERTIFIED MAIL-RRR

Sandra Jackson Sheppard
Sheppard and Associates
Attorney and Counselor at Law
2600 Southwest Freeway, Suite 420
Houston, Texas 77098

Dear Ms. Sheppard:

This is in response to the claim of your client, Mr. Mark Rasmusson, in the amount of $30,000,000.00, for acts complained of beginning on September 19, 1990 and continuing to the present time by several federal and state police agencies. This reply is on behalf of the named federal agencies; i.e., the Federal Bureau of Investigation, Drug Enforcement Administration, U.S. Customs Service, Bureau of Alcohol, Tobacco and Firearms, U.S. Border Patrol, U.S. Marshals Service, and Internal Revenue Service.

Mr. Rasmusson's claim alleges illegal seizures of various property on November 19, 1993, of various property and one Mercedes automobile on November 24, 1992, of Deborah Rasmusson and a box containing business and personal records on May 23, 1992, of a Rasmark Jet at Dallas Love Field on June 16, 1993, of a Rasmark Jet at the El Paso International Airport on September 1, 1993, of a Rasmark Jet at Brownsville, Texas on October 6, 1988, and of a Rasmark Jet in the summer of 1990. Further, Mr. Rasmusson's claim states that Special Agent Larry Frost, U.S. customs Service, contacted attorney William

Cole on June 17, 1992 and falsely alleged that Mark Rasmusson was engaged in criminal activity and urged attorney Cole to lodge an action to seek a court order denying Mark Rasmusson visitation rights with his son. Mr. Mark Rasmusson's claim goes on to allege that a series of terror tactics were used against him over a two-year period, including clandestine entries into the Rasmusson home and office, intimidation of bank officials and Rasmark Jet customers, and attempts to convince the Rasmussons each was out to kill the other.

The Federal Tort Claims Act, under which Mr. Rasmusson's claim is filed, provides that the United States shall be liable for damages proximately caused by the negligent or wrongful acts or omissions of its employees while in the scope of their employment. A complete review of the facts and circumstances having reference to Mr. Rasmusson's claim has been made. Based upon this review it has been established that the federal employees involved were carrying out their law enforcement duties in a reasonable and responsible manner, and in accordance with the authority granted under law. Therefore, Mr. Rasmusson's claim is denied.

This denial is not intended to imply that other procedural or substantive requirements do not also have application in denying Mr. Rasmusson's claim.

In the event Mr. Rasmusson is dissatisfied with this decision he may initiate a lawsuit in an appropriate U.S. district court no later than six (6) months from the date of this notification.

Sincerely,

/s/ Walter Biondi
Assistant Commissioner

(Investigations)

cc: SAC John Navarete
Federal Bureau of Investigation
700 E. San Antonio St., Suite C-600
El Paso, Texas 79901

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Drug Enforcement Administration
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SAC Allan Cramer
Secret Service
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SAC Victor Maldonado
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CBPA Silvestre Reyes

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SAC Gary Brown
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